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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS

and

JOYCE BARR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does relief granted for violations of Title VII of the Civil Rights Act conform to the strictures of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976), that the victims of the discrimination must be made "whole insofar as possible," when the relief denies retroactive competitive seniority to identified victims of discrimination and simply favors incumbent employees, to the extent of rejecting accommodations between the two groups such as granting that seniority to the victims only as openings occur or restoring the victims only to the relative percentile seniority standing which they had when their employment was terminated in violation of the Act?

2. Has the duty required by *Franks* " 'to fashion the most complete relief possible' " and " 'to make the victims of unlawful employment discrimination whole,' " been met, when such relief is denied for any of the following reasons:

A. The victims of discrimination might move to amend the decree in the future;

B. The attractiveness of the position involved has increased, making it more of a permanent career position than a temporary, glamorous one, largely because of the elimination of the employer's rule which was violative of Title VII;

C. After the violation of Title VII had been adjudicated, unusually long litigation delays, caused by invalid legal positions taken by the employer, resulted in the hiring of a substantial number of new employees before the class was granted relief;

D. The presence of flight attendants in furlough status and predictions of no hiring are largely responsible

for the findings of "unusual adverse impact" even though the victims of discrimination are willing to accept reinstatement to their positions only as job openings arise; or

E. The employer threatens to create "false vacancies" if such relief is granted?

PARTIES TO THE PROCEEDINGS

(a) Petitioner Liane Buix McDonald is a Plaintiff, representing a class of female United Air Lines flight attendants. She was an Appellant-Cross-Appellee in the Court below.

(b) Respondent United Air Lines, Inc., is a Defendant. It was an Appellee-Cross-Appellant in the Court below.

(c) Respondent Association of Flight Attendants intervened in the District Court to represent the interests of incumbent United Air Lines flight attendants. It was an Appellee in the Court below.

(d) Carole Anderson Romasanta, and eleven other named individuals,* were respectively the original named Plaintiff and subsequent Intervenors who obtained relief. A final Judgment as to them was entered in 1975, and thereafter Petitioner McDonald has represented the class.

(e) Joyce Barr, one member of the class, filed separate briefs, denominated those of an "intervenor," although she has not sought nor been granted leave to intervene.

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* Susan Fusco, Mary Whitmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles and Joanne Hamersley.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Liane Buix McDonald, on her own behalf and as representative of a class of female flight attendants whose employment with Respondent United Air Lines was terminated because of the employer's discriminatory "no-marriage" rule, petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND JUDGMENTS BELOW

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois which was the subject of the Appeal below was entered

on January 12, 1982 (App. 40a).[1] The Memorandum Opinion is unofficially reported at 31 FEP Cases (BNA) 551. The Order implementing that decision and containing the certification required for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), was entered on July 14, 1982 (App. 94a). The Opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a), and its Judgment (App. 99a), were entered on September 21, 1983. That Opinion is reported at 717 F.2d 1140.

The pertinent earlier opinions in this case or related cases include the following:

1. *Sprogis* v. *United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970), *aff'd*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (these decisions established that the "no-marriage" rule violated Title VII of the Civil Rights Act);

2. *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), *affirming Romasanta* v. *United Air Lines, Inc.*, 537 F.2d 915 (7th Cir. 1976), *reversing* unpublished Order (N.D. Ill. October 4, 1975) (the appellate decision held that Petitioner should have been granted leave to intervene for purposes of appealing denial of class certification); and

3. *McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), *reversing* unpublished Order (N.D. Ill. March 1, 1978) (the appellate decision held that the class should be defined, as requested by Petitioner, to include all persons damaged by the no-marriage rule (within certain time limits)).

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on September 21, 1983 (App. 1a, 99a). A timely Petition for Rehearing with Suggestion for Rehearing *En Banc* was

[1] "App." refers to the Appendix to this Petition.

filed on October 5, 1983, and denied on October 20, 1983 (App. 101a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(3).

STATUTORY PROVISIONS

The pertinent provisions of Title VII of the Civil Rights Act are §§ 703(a), 42 U.S.C. § 2000e(2)(a), and 706(g), 42 U.S.C. § 2000e(5)(g), which respectively read as follows:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
>
> * * * *
>
> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back

pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

STATEMENT OF THE CASE

This action, which now presents issues as to the propriety of denying rightful place seniority to the identified victims of discrimination whose employment was terminated in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Act"), attacked the rule of Respondent United Air Lines ("United") which required the discharge of any female flight attendant who married. This suit was filed in the United States District Court for the Northern District of Illinois in May 1970, by Carole Anderson Romasanta on behalf of a class of United flight attendants. Jurisdiction of the District Court was invoked under 42 U.S.C. § 2000e.

By June 1971, the illegality of the rule had been definitively settled in a related case, *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Since that time, for more than twelve years, the focus has been entirely upon the class action and remedial aspects of the dispute. Much of the relevant procedural history is summarized in the Opinion of this Court in *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), *affirming Romasanta* v. *United Air Lines, Inc.*, 537 F.2d 915 (7th Cir. 1976), and the Opinion below (App. 2a-5a).

In brief, the District Court in December 1972 denied class certification. The Seventh Circuit denied an application for an interlocutory appeal, which the District Court had certified, from the December 1972 Order. In 1975, after a final Judgment was entered in favor of the individually named Plaintiffs, those Plaintiffs decided not to prosecute an appeal from the denial of the class certification. At this point, Petitioner McDonald sought to intervene on behalf of the class in order to pursue such relief. Ultimately she was successful, *see McDonald, supra*, 432 U.S. 385, and she has since represented the class. Subsequently, the District Court entered an Order limiting the class to those persons who had been terminated and excluding those who had resigned because of the no-marriage rule. That Order was reversed, *sub nom. McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979). The present dispute centers on the thus-far successful effort of United and the Association of Flight Attendants ("AFA") to parlay the litigation delays and the interim hiring into a determination that Petitioner's class should be wholly denied competitive seniority retroactive to the time their employment was terminated, and instead should be accorded, upon being rehired, seniority for competitive purposes limited to that earned before their termination 15 or more years ago.

During the lengthy period after the no-marriage rule was held invalid in 1971, United hired thousands of new flight attendants.[2] Approximately 8,700 flight attendants

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[2] An exhibit introduced by United in the District Court (United Trial Ex. 4) reflects that it hired the following number of flight attendants in the years after the employment of Plaintiff's class was terminated:

1969—1,745	1975— 0
1970—1,471	1976— 589
1971— 0	1977— 820
1972—1,778	1978— 803
1973—1,816	1979—1,143
1974— 166	

(of whom over 1,250 were on furlough) were employed by United in April 1981 (App. 18a). The District Court estimated that the class would include approximately 1,400 members.[8]

In capsule, the District Court held that if all members of the class were immediately reinstated with full competitive seniority, there would be an "unusual adverse impact" on the incumbents, principally because some of them might be furloughed; those already furloughed would be lower on the recall list; and they would be subject to transfer of domicile, the geographic base from which attendants bid for assignments. While it did grant the class retroactive seniority in those respects which had no effect on the incumbents, such as pay, days of vacation, and flight passes, it declared that "[f]or all other purposes . . . the McDonald claimants' seniority will be adjusted to reflect the actual amount of seniority accrued during their tenure as flight attendants before they were forced to terminate under the no-marriage rule" (App. 88a).

The District Court rejected all solutions to the competitive seniority problem which would have accommodated the interests of the victims and the incumbents. Petitioner had urged that the class be reinstated with full seniority only as openings occurred; that is, without causing the discharge of any incumbents. This approach was rejected because the District Court thought that it

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[8] The Court accepted the estimate that 1400 of the approximately 1700 former flight attendants identified as potential class members would be entitled to reinstatement (App. 65a-66a), a figure which Petitioner contended below was substantially overstated. The exact number of persons entitled to reinstatement will not be known until hundreds of individual hearings before a Master are completed.

As the Court below recognized, even with the 1400 figure, the proportion of discriminatees to incumbents was comparable to or less than that in *Franks* and other cases in which retroactive comparative seniority had been awarded (App. 18a).

might take a substantial period before there were sufficient openings, and Petitioner had stated that if the delay was in her view excessive she might return to Court in two and a half to three years for further relief (App. 87a).

Likewise, the District Court rejected Petitioner's alternative suggestion that the class be dovetailed into the seniority roster by placing its members at positions relative to those they held when terminated. Such relief would have spread them fairly evenly among all United flight attendants in terms of seniority. The essential rationale for rejecting this specific proposal was that during the course of the litigation the job had changed from one perceived as a temporary and glamorous one to a career position (App. 27a-28a). Although the denial of seniority to the class generally was justified on the ground of the "flexibility" of equity (App. 89a), the effect of the order was to accept the inflexible opposition of United and the AFA to any accommodation, and to return the victims to seniority positions much worse than when the discrimination took place. *See*, p. 10, *infra*.

On an interlocutory appeal certified under 28 U.S.C. § 1292(b), the Seventh Circuit affirmed the District Court's decision in all respects, substantially adopting its reasoning (App. 1a-39a).

REASONS FOR GRANTING THE WRIT

I.

The judgment below is irreconcilable with *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and the decisions of other Courts of Appeals adhering to *Franks*. In *Franks*, this Court established the fundamental principles for providing relief to victims of discrimination in violation of Title VII of the Act. This Court declared that the District Courts must " 'fashion the most complete relief possible . . . . [T]he Act is intended to make the victims of unlawful employment dis-

crimination whole,'" *id.* at 764, quoting the pertinent Senate Report, even if "such relief diminishes the expectations" of incumbents. *Id.* at 774. In particular, this Court held that the presumption must heavily be that discriminatees are entitled to be rehired with retroactive seniority.

This is, so far as Petitioner is aware, the first reported case since *Franks* in which a class of identified victims of discrimination has been denied retroactive seniority. The appellate decisions which have insisted that such seniority be granted, rejecting arguments similar to those adopted by the Court below, include, *e.g.*, *Moore* v. *City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980); *Association Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 287-288 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Moseley* v. *Goodyear Tire & Rubber Co.*, 612 F.2d 187, 191 (5th Cir. 1980); *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 644 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Allen* v. *Amalgamated Transit Union, Local 788*, 554 F.2d 876, 881-882 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); and *Gurmankin* v. *Costanzo*, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 923 (1981).[4]

The Court below acknowledged that its approach was different from that of other Courts of Appeals (App. 17a, n.6). It knew it was interpreting *Franks* in a man-

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[4] Indeed, other United flight attendants whose employment was terminated because of the "no-marriage" rule have been afforded full retroactive seniority. *Sangster* v. *United Air Lines, Inc.*, 632 F.2d 864, 865-866 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *Inda* v. *United Air Lines, Inc.*, 565 F.2d 554, 557 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); *Sprogis* v. *United Air Lines, Inc.*, 308 F. Supp. 959, 961 (N.D. Ill. 1970), *aff'd*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). In October 1969, United and AFA agreed that return to flight attendant positions with restoration of full seniority would be offered to all who had transferred to ground jobs because of the rule and were still so employed, as well as to those who had filed a union grievance or an EEOC charge (AFA Trial Ex. 2).

ner uniquely unfavorable to discriminatees. This Court should not countenance such a blatant disregard of its teachings. To reverse this judgment promptly is of importance, inasmuch as the grounds relied upon by the Courts below to depart from the norm of full seniority relief are ones which could all too readily be used in many other situations to deprive *Franks* of vitality.

Where incumbents may be affected by the granting of relief to a class of discriminatees, other Courts of Appeals have concluded that the appropriate accommodation is to avoid "bumping" incumbents, but, in return, to grant preference in hiring to the victims by reemploying with full retroactive seniority as openings occur. *E.g.*, *Moseley* v. *Goodyear Tire & Rubber Co.*, *supra*, 612 F.2d at 191-192; *Spagnuolo* v. *Whirlpool Corp.*, 717 F.2d 114, 120 (4th Cir. 1983). Those Courts have concluded that this pattern of accommodation affords reasonable protection to incumbents against job loss, while affording meaningful relief to the victims, by requiring the phasing of the discriminatees into active employment over a period of time. The decision below rejects this course followed by sister Circuits.

Other Courts indeed have accorded victims relief denied the class here in cases in which the balance of equities was far less favorable to them than in the present situation, as where the Court went beyond a settlement in which an employer had agreed to hire members of a class who may not have been individually subjected to discrimination, but were merely members of a race generally discriminated against by the employer, and held that the seniority system would not thereafter be allowed to operate against the new hires, *e.g.*, *Stotts* v. *Memphis Fire Department*, 679 F.2d 541, 564-567 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983); or where retroactive seniority has been accorded "new hires" and not restricted to clearly identifiable victims of the discrimination, *EEOC* v. *American Telephone & Tele-*

graph Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

In cold reality, the Court below has marched in the opposite direction from *Franks*: It has transformed the narrow escape hatch language of *Franks*, that the District Courts in formulating seniority relief may take measures to avoid "unusual adverse impact" upon incumbents, 424 U.S. at 779, n.41, to justify *eschewing* the compromise generally adopted to avoid such an unusual impact, and even to justify eschewing accommodations, such as comparative seniority, which are much less favorable to the discriminatees. Significantly, the Courts below, in asserting that such an "unusual adverse impact" was present here, focused upon the impact that would occur if all the class were reinstated at once (App. 21a-26a), and improperly equated that impact with any which would result from such accommodations. Whether any such approach should be sanctioned is an important and recurrent question of the remedial aspects of Title VII, which warrants plenary consideration by this Court.

While both the Courts below discussed at length the potential effect upon incumbents of immediate reinstatement of the entire class, neither discussed the effect upon the class of this denial of full seniority. Under this decision less than 1 percent of the class will be in the top half of the seniority list, some 8 percent in the third quarter, and more than 90 percent in the bottom quarter. In contrast, when their employment terminated because of the discriminatory rule, 16 percent of the class was in the upper quarter of the seniority roster; 26 percent in the second quarter; and 35 percent in the third (Record in Court below, R. 431). The class therefore will suffer to a far greater degree the adverse effects of loss of seniority than the portion of the incumbents which gradually would be affected if Petitioner's return-on-openings approach prevailed. Such a result is antagonistic to *Franks* and flouts its ultimate prescription that victims of discrimination must be accorded as complete relief as possible.

II.

The reasons given by the Court below for its decision are themselves further inconsistent with *Franks*, as well as with settled principles of equity.

1. The Court denied the openings proposal because the discr[illegible]dicated that they desired to be reinstated [illegible]asonable period; and if this did not occur, the[illegible]gnt [illegible]n to the Court for appropriate relief (App. 25a-26a). To deny relief which is appropriate now, because the beneficiaries may seek to modify it in the future in the light of subsequent developments, is plainly inconsistent with the teachings of this Court that any party has a right to seek revision of the decree in light of events, *see, e.g., Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 437 (1976); *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961), and an abuse of discretion. To penalize litigants because they reserve a traditional right of a party is a like error and abuse.

Furthermore, the judgment that no relief should be awarded because of the Court's assumption that reinstatements could not be accomplished within a pre-set time period is manifestly unjust and illogical. It is unjust to deny some relief because full relief may take too long. It is illogical to believe that the future may be so precisely predicted that any requested or possible adjustments to the actual situation as it develops should be forestalled. Justice delayed is better than justice now denied.[8]

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[8] The error of this approach is shown by the facts, which came to light during the pendency of the appeal and were made known by Petitioner to the Court of Appeals, that United had recalled to active service all of the more than 1,250 flight attendants who were on furlough, and also was training people for possible openings in 1984 (Petition for Rehearing, 6-7). Nevertheless, a portion of the "adverse impact" described below was that furloughees would not be able to return to active employment and might even be dropped

The Court below labelled a "condition" Petitioner's announced intention to move to amend the decree if reinstatements of the victims were not completed within the stated time (App. 25a-26a). It held that this "condition" rendered the normal openings approach unavailable. Petitioner never characterized her statement as a "condition." In any event, invocation of that word is not a justification which this Court should tolerate for failing to fashion an equitable result. Particularly in a Title VII case, the Court has an independent obligation to disregard or modify an inappropriate condition to provide the remedies mandated by this Court.

In a Title VII case, the Federal Courts "have '"not merely the power but *the duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past . . . ."'" *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977) (emphasis added), quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975), which relied on *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). Contrary to this duty, the Courts below rejected the "openings" proposal made by the discriminatees, without any genuine attempt to devise any other relief consistent with the purposes of the Act or to amend or adapt Petitioner's proposal to the requirements of justice under the circumstances. The District Court considered its function performed when it rejected the proposals as tendered by the discriminatees; and the Court below agreed. An approach so passive to providing equitable relief under Title VII cannot be squared with the mandates of this Court. The judgment below reflects an abdication of judicial responsibility which demands corrective action by this Court.

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from the rolls, if the discriminatees were promptly reinstated (App. 29a-30a). In fact, not only have the furloughees been called back, but also now United has had immediate openings for those 105 members of the class who thus far have been reinstated (albeit with limited seniority) as the consequence of further proceedings in the District Court.

2. The most bitter of the unjustifiable standards mobilized against the discriminatees is that the flight attendant position involved "was once viewed as a temporary, glamorous job [but] is now considered a career position" (App. 28a). The cruel irony is that the main generator of this change was the elimination of the discriminatory "no-marriage" rule, branded as illegal in this very litigation. It was a "temporary, glamorous job" precisely because the predicate was that only single women should have it; and the implicit assumption was that they would consider the job primarily as an opportunity to get married or an interval before marriage, rather than as a career in the then generally masculine meaning of "career." Those who found this presumption unacceptable, who considered the rule sexist and illegitimate, and have succeeded in this litigation, now have their vindicated positions cited as a basis for denying them relief. It is difficult to imagine a more egregious disregard or noncomprehension of the purposes of civil rights legislation. Hostility to the precepts of such legislation cannot be a proper basis for limiting relief. *Cf. Watson* v. *City of Memphis*, 373 U.S. 526, 531 (1963).

Also unrecognized below is the fact that the incumbents have been enjoying the benefits of the attack against this discriminatory rule. They may marry or plan on marriage without loss of the job. Equity counsels that those who conferred the benefits are entitled to more understanding and favorable consideration, vis-a-vis the incumbent beneficiaries, even than is normally the case and certainly than was afforded below. The employment of an utterly improper criterion for denying relief and the grievous departure from equity, contrary to the principles promulgated by this Court to effectuate the remedial purposes of the Act, merits review by this Court.

3. The judgment below undermines the remedial purposes of the Act by penalizing the class for litigation delays, and in weighing the effects of such delays exclu-

sively in favor of incumbents and simply affording no consideration of its impact upon the victims of discrimination. As the Statement above indicates, this case has consumed over a decade, as a result of legal issues raised against Petitioner's class by United. The latter's right to litigate positions ultimately rejected should not result in special protection for those employed while it was litigating, as the Courts below inferred. They failed to realize that this result encourages obstructive and delaying tactics in Title VII litigation. Such tactics would be rewarded, if the judgment below remains unreviewed, by reducing, indeed minimizing, the relief that could be obtained by the victims. The more incumbents, the fewer opportunities for meaningful relief. The judgment below thus works effectively to frustrate, rather than to fulfill, the purposes of the Act and the mandates of this Court enforcing the Act.

Moreover, the District Court departed from those purposes, with the approval of the Court below, by concentrating on the potential impact upon the class of incumbents swollen in numbers by the delay in litigation, without placing on the scales of equity the practical impact upon the class of discriminatees. The exceptionally long delay in obtaining reinstatement or any other relief will be continued, and with no ready end in sight. When reinstated, the class members will have only such truncated seniority as to condemn them to severely subordinated positions on the seniority ladder. Accommodations which have enabled other victims of discrimination to gain some meaningful retroactive competitive seniority have been denied them, through no fault of their own.

On the other side of the scale, under settled principles, those who become incumbents under such circumstances have diminished equities. *E.g.*, *Lee* v. *Macon County Board Of Education*, 453 F.2d 1104 (5th Cir. 1971); *Spagnuolo* v. *Whirlpool Corp.*, *supra*, 717 F.2d at 122; *see generally Porter* v. *Lee*, 328 U.S. 246, 251 (1946).

Those who entered the flight attendant position after the invalidity of the rule had already been established should not be heard to say that it is an "unusual adverse impact" for those awaiting relief to be favored in seniority over them. The judgment below cannot be reconciled with *Franks* or the Act.

4. The Courts below were persuaded to deny the victims of discrimination retroactive competitive seniority relief primarily on the basis of predictions that, because of economic conditions, there would be no growth in the need for flight attendants in the next few years, and United already had some 1,200 employees on furlough. These conditions, the Court below declared, were "[p]articularly relevant to disposition of this case" (App. 8a) and "extremely relevant to the present case" (App. 18a); and it concluded that "the economic conditions affecting United . . . are largely responsible for the finding of 'unusual adverse impact'" (App. 39a). In placing such overweening emphasis on the economic conditions allegedly facing the employer, the Court acknowledged that its approach in considering whether there was an "unusual adverse impact" on incumbents was not in accord with that of other Circuits, especially that of the Second Circuit in *Association Against Discrimination* v. *City of Bridgeport*, *supra* (App. 17a).

This Court intended that the "unusual adverse impact" exception should be narrowly applied, lest it inhibit or prevent achievement of the purpose of the Act to eradicate the effects of discrimination. *See Franks*, *supra*, 424 U.S. at 779, n.41. The denial of relief in this case based on economic conditions of the employer (which had employees on furlough with projections that it would not be hiring employees in the affected classification) is particularly unfair to victims of discrimination who were willing to assume the risk that the employer's economic condition would improve by proposing to return only as open-

ings occurred.[6] Whether the economic conditions of an employer should be accorded such exceptional deference in relieving the employer of the normal result that retroactive seniority would be awarded is an issue of great and continuing significance to the enforcement of Title VII, warranting consideration by this Court. *Cf. Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983) (appropriate sharing of remedial relief between persons who are not identified victims of employment discrimination and incumbents under adverse economic conditions).

5. The Court below in denying seniority relief to the class relied upon yet another impermissible factor: It held that if an openings approach were followed there might be an adverse impact upon incumbents because United was threatening to create "artificial vacancies" and "false vacancies" by which it would terminate incumbents in order promptly to hire discriminatees and lessen the monetary compensation owed them (App. 26a-27a). This holding is a severe threat to the integrity of decrees under Title VII and should not be countenanced by this Court.

First, any unscrupulous employer could create "false vacancies"; that possibility certainly does not present a situation "that would not be generally found in Title VII cases," *Franks*, *supra*, 424 U.S. at 779, n.41. Further, it is improper for the Court to deny equitable relief because of unseemly threats of the discriminating employer to use inequitable artifices in order to limit the reach of Title VII relief. The proper reaction to such a threat is to broaden the injunction to prevent such actions of the employer, not further to harm the victims of the dis-

[6] As discussed at pp. 11-12, n. 5, *supra*, the employer's economic condition did improve and openings presently exist for returning class members.

crimination. Such defiance is ground for strengthening, not lessening, the relief.

The judgment below is thus so grossly wide of the mark of providing "make whole" relief and respecting the presumption in favor of rightful place seniority demanded by *Franks* as to call for review and reversal by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS

and

JOYCE BARR,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 82-2647, 82-2660, 82-2661

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her own behalf and and behalf of all others,
Plaintiffs-Appellants-Cross-Appellees,

v.

UNITED AIR LINES, INC., a corporation,
Defendant-Appellee-Cross-Appellant,

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Illinois

No. 70 C 1157—James B. Moran, *Judge*

ARGUED MAY 9, 1983—DECIDED SEPTEMBER 21, 1983

Before PELL and CUDAHY, Circuit Judges, and GIBSON, Senior Circuit Judge.*

* Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

PELL, Circuit Judge.

These interlocutory appeals concern the district court's determinations, following a hearing, as to the seniority relief to which former flight attendants of United Air Lines, Inc. (United), who left United because of that airline's "no-marriage" rule, are entitled upon reinstatement with the airline.

The principal issue raised on appeal is whether the district court properly applied the rule in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), in granting seniority for competitive purposes equal only to the number of days the claimants had previously been employed as flight attendants by United. On cross-appeal, United challenges the grant of seniority retroactive to date of original hire for purposes of compensation and other non-competitive benefits. Consolidated with this appeal and cross-appeal is the class' appeal from the district court's denial of injunctive relief upon United's recall in October, 1982, of 175 furloughed flight attendants.

I. BACKGROUND

A. Prior Proceedings

Prior to November, 1968, United prohibited the continued employment as a flight attendant of any female employee who married. United also employed a small number of male flight attendants who were permitted to retain their positions after marriage. On November 7, 1968, United and the flight attendants' union agreed to revoke this no-marriage rule. Reinstatement was offered to those flight attendants terminated because of the rule only if they had filed a grievance with the union or a complaint with the Equal Employment Opportunity Commission (EEOC).

On November 27, 1968, Mary Burke Sprogis brought suit in the Northern District of Illinois alleging that the

no-marriage rule was violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e – 2000e-17 (Title VII). The district court granted summary judgment in favor of Sprogis. *Sprogis v. United Air Lines, Inc.*, 308 F.Supp. 959 (N.D Ill. 1970). That result was affirmed by a majority of this court in June, 1971. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971).

During pendency of the *Sprogis* appeal, Carole Anderson Romasanta filed a class action in the Northern District of Illinois on behalf of herself and other United flight attendants terminated because of the no-marriage rule. The district court ruled that the *Romasanta* case should not proceed as a class action but by individual intervention of those discharged flight attendants who had either filed a union grievance or an EEOC complaint. A settlement was reached by the parties providing for reinstatement and backpay awards to the plaintiffs and a final order was entered by the district court approving the settlement.

One of the discharged flight attendants who had been excluded from the *Romasanta* case because of the adverse class ruling, Liane Buix McDonald (McDonald), sought to intervene to challenge the class determination. The district court denied intervention and an appeal was taken to this court. A majority of this court reversed, remanding the case with instructions to permit McDonald to intervene, to treat the case as a class action, and to fashion relief for the class. *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915, 920 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

On remand, the district court limited the class to persons actually discharged by United. Those who had resigned because of the rule were excluded. This court again reversed, holding that resigners were entitled to be class members and noting that the class might include all persons who left United because of the rule within the

period from ninety days before the filing of EEOC charges to the date on which the no-marriage rule was abolished. *McDonald v. United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979).

On remand, the Association of Flight Attendants (AFA), the union representing incumbent flight attendants at United, was permitted to intervene. After notice was given, approximately 1,750 potential class members were identified. Before the commencement of individual hearings to determine actual class membership, United and the AFA successfully urged that the district court hold an evidentiary hearing to determine whether reinstatement with retroactive seniority to the date of original hire would result in an "unusual adverse impact" on incumbent flight attendants, *see, Franks v. Bowman Transportation Co.*, 424 U.S. 776, 779 n.41, 96 S.Ct. at 1270, 1271 n.41 (1976). In the course of the ensuing hearing, the class plaintiffs clarified that they sought reinstatement only as openings among the ranks of flight attendants occurred (openings proposal) rather than immediate reinstatement of the entire class.

In a memorandum and order issued January 8, 1982, the district judge found the openings proposal, as conditioned by the class, to be unworkable. He also found that "unusual adverse impact" would surely result if the class members were reinstated immediately with full retroactive seniority for competitive purposes. The relief granted credited the class members with seniority based on the number of days they had actually worked at United as flight attendants for those benefits requiring competition among flight attendants. The district judge granted the claimants seniority from date of original hire for those benefits representing a cost to the airline but not impacting directly on incumbent flight attendants. The class immediately filed a motion to reconsider, urging that they at least be accorded "relative seniority" for competi-

tive purposes (relative seniority proposal). Under this proposal, a class member whose seniority for competitive purposes placed her at the ninetieth percentile when she left United would be inserted into the current seniority list at that same percentile. This motion was denied without opinion. On July 12, 1982, the district judge issued an order implementing his earlier memorandum and order. He certified for immediate appeal the question whether less than full retroactive seniority could be granted class members for competitive purposes. *See* 28 U.S.C. § 1292 (b). The class' appeal on that issue, No. 82-2660, and United's cross-appeal pertaining to the award of full retroactive seniority for purposes of compensation and other company benefits, No. 82-2661, followed.

In August, 1982, United indicated that it would recall 175 flight attendants from furlough on October 1. The plaintiff class sought to enjoin this recall, believing that it prejudiced the seniority rights awarded claimants pursuant to the order of July 12, 1982. The district court denied the requested stay, refused to require the recall of claimants rather than furloughees, and declined to rule on the claimant class' alternative request that they be permitted to accrue seniority during the period of the recall. The plaintiffs' appeal from this ruling, No. 82-2647, has been consolidated with Nos. 82-2660 and 82-2661 for purposes of argument and decision.

B. Factual Background Relevant to Reinstatement Issues

1. Competitive and Company Seniority.

Seniority is extremely relevant to the flight attendant position. The term "seniority" is used in several different contexts. The first, company seniority, determines a flight attendant's number of vacation days and number of passes to which he or she is entitled, as well as other similar benefits provided by the airline. Company seniority reflects the employee's total service with the airline. Because all of the matters determined by company senior-

ity represent a cost to the airline, but are not otherwise limited in their availability, the amount of company seniority awarded the class members is extremely important to United but has little direct impact on incumbent flight attendants.

Classification seniority, on the other hand, reflects the amount of time an employee has worked as a flight attendant. Classification seniority is utilized in an absolute sense to determine the flight attendant's salary. Like company seniority, the classification seniority awarded class members for purposes of salary calculation is of primary concern to United and of minimal concern to incumbent flight attendants.

Classification seniority also is utilized in a relative sense and is pertinent to those aspects of the flight attendant job that require United to distinguish among the flight attendants. For instance, the airline maintains eleven separate "domiciles" to which flight attendants are assigned. Some, like Seattle and Miami, are considered far more attractive by flight attendants than others, such as Chicago. Because flight attendants bid for domiciles based on their classification seniority, the flight attendant with the greatest classification seniority relative to other flight attendants, has the best chance of being stationed where she chooses. The impact of relative classification seniority, therefore, is directly felt by other flight attendants. Because of this effect, we will hereafter in this opinion refer to such seniority as "competitive seniority." [1]

Besides determining the attendant's domicile, competitive seniority is utilized in furloughing, or laying off, flight attendants if such action is required, with the least senior employee being the one most vulnerable to furlough. Within each domicile, competitive seniority determines whether the flight attendant is a "lineholder," who

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[1] "Competitive seniority" is therefore synonymous to "relative classification seniority."

flies a predetermined fixed monthly schedule, or one who must serve on "reserve," in which case the flight attendant's lines of flying are determined by the airline, at its option, and according to its needs. Competitive seniority also determines whether the individual will work only during weekdays or also during the weekend and whether he or she will work a flight that offers premium pay. Finally, and of extreme importance to the flight attendants, whether one is subject to involuntary transfer to a different domicile is determined by competitive seniority within the domicile from which the flight attendants are to be transferred.

Although much of the evidence presented in the trial below on reinstatement issues will be developed later in this opinion, it is important to note that assignment of a domicile is considered extremely important by flight attendants. The evidence indicated, for instance, that some flight attendants would be more willing to fly "reserve" at a more desirable domicile than to be a lineholder at a less desirable domicile. Accordingly, the possibility of involuntary transfers is regarded with great concern. Such a transfer presents the flight attendant with a choice of relocating or "commuting" from one's home to one's domicile. The cost of commuting—both in terms of time and money—are significant. Similarly, the costs of relocation can be exceedingly high in personal terms, particularly if the flight attendant has been assigned to one domicile for a lengthy period of time and/or has a spouse and children with work and community ties in that locale.

Not surprisingly, the other part of the flight attendant experience affected by competitive seniority that is of overriding concern to flight attendants is the possibility of furloughs. A furloughed flight attendant does not receive regular compensation during the furlough, does not continue to accrue seniority, and all recall rights are extinguished after the lapse of five years.

2. Economic Factors.

Particularly relevant to disposition of this case are economic factors affecting United in the past several years. In the years 1979, 1980, and 1981, United experienced operating losses, after taking into account the tax advantages of these losses, of $99,583,000, $15,043,000, and $104,368,000, respectively. Undoubtedly reflecting this economic picture, United has not hired a single flight attendant since 1979 and has furloughed 1,530 employees during that period. Although 547 of these employees were furloughed because of cutbacks necessitated by the air traffic controllers' strike in 1981, and one would therefore assume their lay-off to be temporary, the AFA brief submitted in this case indicates that there are currently 1,255 furloughed flight attendants.

The district court also found that reinstatement of 1,480 claimants[2] would create an immediate non-recurring cost to United in excess of $10,000,000. The annual recurring cost to the airline of reinstating the claimants would be approximately $21,000,000.

3. Factors Not Yet Determined by the District Court.

Although this court has accepted this interlocutory appeal on the reinstatement issues, there are several facts not yet determined that are relevant to the seniority issues we address herein. First, the size of the class is not yet certain. Subsequent to oral argument in this case, hearings before special masters have commenced. The purpose

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[2] As discussed in Section II, *infra*, the district judge determined that the figure 1,400 represented a reasonable estimate of class members likely to seek reinstatement by United. Accordingly, he utilized that figure throughout his memorandum opinion. The only exception is in the findings regarding costs to United resulting from reinstatement of the class. Only United presented evidence on that point and, in so doing, United assumed that 1,480, rather than 1,400, class members would seek reinstatement. The district judge similarly utilized the 1,480 figure for purposes of this one issue and, in footnote, explained his reasons for doing so.

of these hearings is to determine whether a claimant left United because of the no-marriage rule or for other reasons. Only upon completion of these hearings will there be certainty as to the size of the class. Whether all class members, once they are determined, will actually seek reinstatement is similarly unknown.[3]

Second, the district court held hearings in November and December, 1982, relating to the issues of back pay and front pay for class members in this action. Front pay is the amount that United would be required to pay class members whole they await actual reinstatement by the airline. Although the district judge did not consider the impact of front pay in his order, that potential cost is relevant to this appeal. Because of the financial impact it would have on United, the airline has indicated that it both could, consistent with the collective bargaining agreement, and would furlough incumbent flight attendants in order to permit a more rapid reinstatement of claimants.

II. ISSUES RAISED BY INTERVENOR BARR

The initial issue we must consider is whether the district court's use of the number 1,400 as an estimate of class members likely to seek reinstatement misrepresents the size of the class and prejudices the results of analyzing the impact on incumbents of the proposed seniority remedies. Joyce Barr, a member of the class represented by McDonald, urges that a substantially smaller number should be utilized and that the class should be subdivided between those former flight attendants who want to return to work and those who primarily seek a financial remedy.

Barr's argument is that the number 1,400 is unrealistic because many of the persons who responded to the class

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[3] In portions of this opinion, the term "class members" is used in speaking of all those persons who potentially will be found entitled to relief and who will seek reinstatement.

notice will be unable to prove that they left United because of the no-marriage rule and, of those who survive that threshold determination, many will not want to return to a position they left fifteen or more years ago. Barr asserts that McDonald is using this inflated number in order to force financial concessions from the airline. The result is that those class members who actively want to return to United are being sacrificed to a litigation strategy that favors those seeking financial benefits, rather than work, from this suit.

Contrary to Barr's contentions, the 1,400 figure is not simply McDonald's estimate. It is the number upon which the AFA, United, and McDonald agreed at pretrial conferences in September, 1980, and February, 1981, because all the parties recognized that some figure had to be used for purposes of resolving the reinstatement issues in this case. By the time the hearing below was held, all three parties were urging different numbers, of which McDonald's 1,069, was the lowest.

The district court utilized the figure 1,400 after carefully analyzing the methodology used by McDonald in arriving at the 1,069 figure. The district judge's conclusion was that any one mistaken assumption in McDonald's calculations would raise the figure by three to five hundred class members and therefore the 1,400 figure was more realistic.

The real difficulty here, as recognized by the judge below, is that the relevant assumptions are untestable. Only after the conclusion of the class membership hearings now in progress, and scheduled over the next two to three years, will it be clear who is in the class. Even that figure may not reflect the number of claimants who finally seek reinstatement. That variable is virtually impossible to assess at this time, especially because the attractiveness of reinstatement may depend, in the view of some claimants, on the resolution of this appeal.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 376, 97 S.Ct. 1843, 1875, 52 L.Ed.2d 396 (1977), the Court observed that until "both the number of identifiable victims and the consequent extent of necessary relief have been determined, it is not possible to evaluate the abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the contractual rights of nonvictim employees." This passage suggests that the reinstatement issues now before this court would be better addressed by the district court only after the number of persons at least *entitled* to reinstatement is determined. Delaying resolution of the seniority questions to that time would be the only practical way of responding to intervenor Barr's concerns.

The district court decided to proceed, however, and this court has accepted the resulting interlocutory appeal, because a case that has already been unresolved too long threatens to extend indefinitely if resolution of the seniority questions are delayed until completion of the class eligibility hearings. Because the district court found it imperative to proceed before the precise number of class members was determined, we can demand no more than that the estimate of class members reflect the varying positions of the parties and that the basis for choosing the figure 1,400 be demonstrated in the record. Both conditions are satisfied here.

Not only do we find the number 1,400 a reasonable estimate of persons who will seek reinstatement, but, like the district court, we are persuaded that McDonald is not undermining the interests of some members of the class. She has presented alternative proposals regarding seniority relief, briefed each at length, and actively sought full, retroactive seniority for class members. We find no error in the district court's refusal to subdivide the class. Not only is subclassing unnecessary in view of McDonald's vigorous representation, but it would be im-

possible to determine at this point which potential class members "really" want to return to their positions at United and which "really" seek only a financial remedy.

In light of our decision that the district court did not err in utilizing the figure 1,400 and in refusing to subdivide the claimant class, we hereby deny the various motions pending before this court that pertain to materials bearing on a reevaluation of the number of claimants likely to seek reinstatement.[4]

III. COMPETITIVE SENIORITY

The primary issue raised by the plaintiffs on this appeal is whether the district judge abused his discretion, particularly in view of *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (*Franks*), in declining to grant the class members full, retroactive competitive seniority upon their being rehired by United. The class members are entitled, under the court's ruling, to only the competitive seniority they had actually accrued at the time they left United because of the no-marriage rule.

A. Franks *and Its Progeny*

In *Franks*, the Supreme Court, reversing the Fifth Circuit, held that nonemployees who had applied for and been refused employment as over-the-road truck drivers by Bowman Transportation Co. (Bowman) solely because of their race were entitled, pursuant to Title VII, to seniority status retroactive to the dates of their employment

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[4] The following motions are accordingly denied: (1) Intervenor Barr's motion to supplement record on appeal (filed 5/13/83); (2) AFA's motion for leave to comment on intervenor Barr's Circuit Rule 11 submissions (filed 5/18/83); (3) class' motion for leave to file response to post-argument submissions (filed 4/20/83); (4) response of intervenor Barr to AFA's motion for leave to file comment (filed 5/20/83); and (5) responses of AFA to class' motion to file response to post-argument submissions (filed 5/27/83).

applications. The Supreme Court reasoned that one of the central purposes of Title VII is " 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' " 424 U.S. at 763, 96 S.Ct. at 1263 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975)), and that ordinarily a grant of seniority reflecting the discrimination victim's date of application is necessary to achieve that "make-whole" purpose, 424 U.S. at 766-67, 96 S.Ct. at 1265.

One of the arguments advanced by Bowman in support of the lower courts' refusal to grant the seniority relief was that the district court had correctly exercised its discretion in denying retroactive seniority because of the competing interests of incumbent employees. The Supreme Court rejected this argument for two reasons: first, because the district court had not mentioned these considerations in denying the relief,[5] and, second, because " '[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.' " *Id.* at 775, 96 S.Ct. at 1269 (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2nd Cir. 1971)). Although the Court recognized that the burden of granting competitive seniority falls primarily on innocent incumbent employees, *see* 424 U.S. at 773 n. 33, 776-78, 96 S.Ct. at 1268 n. 33, 1270-71, it held that a "sharing of the burden of past discrimination" is "presumptively necessary," *id.* at 777, 96 S.Ct. at 1270.

The Court recognized, however, that an award of full, retroactive seniority may not be appropriate in every case. In footnote, the Court clarified that it did not

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[5] There is no indication in the *Franks* opinion that the question of impact on incumbents had even been presented to the district court.

intend to abrogate the equity powers of the district courts:

> Rather our holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.

Id. at 779 n. 41, 96 S.Ct. at 1271 n. 41.

The appellants interpret *Franks* as holding that a diminution of incumbents' job expectations can *never* constitute unusual adverse impact. Although they are less explicit as to what would, in their view, constitute the degree of impact envisioned by the *Franks* Court as sufficient to preclude the granting of full, retroactive seniority, two possibilities are suggested. First, circumstances unrelated to the impact on incumbents might support a finding of unusual adverse impact. Second, implementing a seniority remedy so as to cause the discharge of incumbent employees might result in "unusual adverse impact."

We find little support in *Franks*, the appellate decisions of this and other courts that have applied *Franks*, or the Supreme Court disposition in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (*Teamsters*), for such a limited interpretation of the "unusual adverse impact" standard. Because the *Franks* Court was well aware that the burden of granting retroactive seniority to discrimination victims falls primarily on innocent incumbents, *see* 424 U.S. at 773 n. 33, 776-78, 96 S.Ct. at 1268 n. 33, 1270-71, there is no basis in either law or logic for concluding that "unusual adverse impact" must reflect

factors unrelated to the impact of the remedy upon incumbent employees. Similarly, the *Franks* opinion nowhere states that *only* the resulting discharge of incumbents will constitute unusual adverse impact. What *Franks* does clarify is that full retroactive seniority should not be routinely denied discrimination victims merely because such relief will have some impact, as it always will, on incumbents. Because neither the district nor appellate courts in *Franks* had relied on the competing rights of incumbents as a ground for denying seniority relief, the impact in that case was indeed "abstract," *id.* at 779 n. 41, 96 S.Ct. at 1271 n. 41, and was not demonstrated by "facts and circumstances that would not generally be found in Title VII cases," *id.*

Our conclusion that *Franks* did not limit the "unusual adverse impact" inquiry to the extent urged by the class is supported by the Supreme Court disposition in *Teamsters*. Again emphasizing that it is within the equitable discretion of the district court, in the first instance, to fashion a seniority remedy, the Court referred to the "equitable balance that should be struck between the statutory rights of victims and the contractual rights of nonvictim employees," 431 U.S. at 376, 97 S.Ct. at 1875, and suggested in footnote that the number of victims, the number of non-victim employees affected, the alternatives available to incumbents, and the economic circumstances of the industry would be relevant to the district court's exercise of discretion, *id.* at 376 n. 62, 97 S.Ct. at 1875, n. 62. Focusing on the timing of the equitable remedy, the Court observed that:

> Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order

> to determine the "special blend of what is necessary, what is fair, and what is workable."

Id. at 375, 97 S.Ct. at 1874 (citation omitted).

The courts of appeals similarly have not read *Franks* as mandating so limited an inquiry as that urged by the class. For instance, in *Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980), the Ninth Circuit noted the district court's findings that, not only would no incumbent lose his job, but that the seniority relief granted the twelve class members would have "minimal" impact on the incumbent workforce of 590 people. In *Air Line Stewards and Stewardesses Association, Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1169 (7th Cir. 1980), *aff'd sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), this court relied in part on the likelihood that the claimants, who constituted three percent of the incumbent workforce, could be reinstated in less than one-half year through normal attrition. In *Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir. 1978), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190, this court relied in part on the representation made to the district court that the class members, who again constituted approximately three percent of the incumbent workforce, would return only to domiciles where openings occurred. *Id.* This court also noted that the district court had made "an admirable effort to sort out the likely impact of and the 'balance of equities' surrounding the provision of retroactive occupational seniority," *id.* at 965, and had assured itself that no present employees would lose their jobs and "also that the number of returning employees was not so large as to create undue problems," *id.* Finally, in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2nd Cir. 1981), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1982), the Second Circuit, in affirming the

district court's order of a freeze on incumbent promotions in order to equalize promotional seniority among current employees and victims of discrimination, noted that it was possible the City could act to minimize the burden on incumbents. *Id.* at 287.

The appellate cases discussed above compel the conclusion that courts have considered numerous factors, not just whether current employees would lose their jobs, in granting or reviewing a grant of seniority relief.[6] We therefore reject the appellants' argument that the court below abused its discretion in considering the many different kinds of impact a grant of full, retroactive seniority would have on those persons currently employed by United as flight attendants.

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[6] The only court of appeals case that arguably could be construed to hold that it is an abuse of discretion, under *Franks*, not to grant full, retroactive competitive seniority is *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2nd Cir. 1981), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1982). In a portion of that opinion not discussed *supra*, the Second Circuit held that the district court had erred in granting less than all the benefits of seniority to discrimination victims. The court noted that the plaintiffs had not specified what benefits they had been denied, *id.* at 288, but suggested that the plaintiffs should be provided with vacation and sickpay appropriate to their "rightful place" in the seniority system and should have the benefits of seniority for purposes of avoiding lay-off if the City maintained a last-hired-first-fired seniority system.

Initially, we note that benefits such as vacation days and sick pay are not within the realm of "competitive" seniority. To the extent that the Second Circuit *did* order an award of competitive seniority without the benefit of any inquiry into what impact that relief might have on incumbent employees, we decline to follow the *Bridgeport* court's interpretation of *Franks* in light of this court's previous observation that it is both proper and necessary to "sort out the likely impact of and the 'balance of equities' surrounding the provision of retroactive occupational seniority." *Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960, 965 (7th Cir. 1978), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190.

B. Application of Franks *and* Teamsters *to this Case*

Franks mandates that a finding of "unusual adverse impact" be based on factors not generally found in a Title VII case. 424 U.S. at 779 n.41, 96 S.Ct. at 1271 n.41. *Teamsters* suggests that the relevant considerations would include the number of victims, the number of non-victim employees affected, the alternatives available to incumbents, and the economic circumstances of the industry. 431 U.S. at 376 n. 62, 97 S.Ct. at 1875 n. 62.

Relying on the first two factors enunciated in *Teamsters*, the appellants argue that the ratio of class members to incumbents in this case, sixteen percent, is less than that in *Franks*, *Teamsters* and *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2nd Cir. 1981), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1982).[7] Because none of those cases precluded an award of full, retroactive competitive seniority, and particularly because the Second Circuit in the *Bridgeport* case held that the district court had abused its discretion in ordering less than full seniority, the appellants claim that the judge below should have ordered the full measure of competitive seniority.

The difficulty with the class' argument is that it focuses on only two of the factors enunciated by the *Teamsters* Court. The current economic conditions affecting the airline industry are extremely relevant to the present case and, under *Teamsters*, were properly considered by the district court. By contrast, economic considerations have not been deemed pertinent to other courts of appeals decisions regarding competitive seniority. We conclude,

[7] The appellants assert that the class members in *Bridgeport* constituted twenty percent of the incumbent workforce. This represents the ratio of the 102 persons ordered entitled to priority in hiring by the district court to the workforce of 512. Because the court of appeals reduced the number on the priority hiring list to 73, the correct percentage would appear to be fourteen percent.

therefore, that the prior case law has limited relevance to evaluation of the district court's application of *Franks* and *Teamsters* to this case [8] and reject the appellants' suggestion that an award of retroactive competitive seniority is required in this case because of the ratio of class members to incumbents.

Having determined that the district court neither ignored nor misapplied the controlling principles of law, our task on review is to determine whether evidence in the record supports its conclusions that an award of full, retroactive competitive seniority would result in an "unusual adverse impact" on incumbents. Before undertaking that review, however, we address the appellants' contention that the district court mischaracterized the relief they sought.

During the course of the trial below on reinstatement issues, the class clarified that it sought reinstatement at United only as openings permitted. This proposal was conditioned in several ways, which are developed in detail, *infra*. In his memorandum opinion, the district judge did consider this openings proposal. He found it unworkable because of the conditions upon which the class insisted. The district court then also considered the impact of

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[8] Having determined that *Franks* and *Teamsters* require the district court to evaluate carefully the many facets of impact that an award of competitive seniority will have on innocent, incumbent employees, the fact that we herein review the district court's *denial*, as a matter of discretion, of full competitive seniority relief further distinguishes this case from previous decisions in which this and other courts of appeals have reviewed a *grant* of full seniority. *See, e.g., Air Lines Stewards and Stewardesses Association, Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980), *aff'd sub nom. Zipes v. Trans World Airlines, Inc.*, 445 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982); *Moore v. City of San Jose*, 615 F.2d 1265, 1271-72 (9th Cir. 1980); *Air Lines Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir. 1978), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190.

immediate reinstatement of all the class members and concluded that "unusual adverse impact" would result. He similarly considered the impact that would result *if* the openings proposal were workable and were implemented and, as to some of the categories of consequences reviewed, found it to be somewhat less than the impact of immediate reinstatement.

We find no error in the district court's consideration of the impact that would result from immediate reinstatement of the class. Such analysis was wholly appropriate in light of the mandate in *Franks* and *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), that the district court should fashion a remedy that would "make [the class] whole" for the injuries suffered as a result of discrimination. Further, the district court did not ignore the openings proposal but, rather, found it both unworkable and the cause of significant, adverse impact on incumbents if it *were* workable. We are not persuaded, therefore, that the district court's "error" lay in its mischaracterization of the relief sought by the class.

C. Review of the District Court's Findings

A total of three proposals regarding seniority relief were presented by the class. We first review the findings regarding immediate reinstatement of the class. Second, we review the determinations regarding the openings proposals and, finally, we consider the class' request for relative seniority.

Throughout his opinion, the district judge grouped the consequences of granting the requested relief as follows: (1) the possibility of furloughs and firings; (2) the potential for involuntary transfers; (3) demotions to reserves; (4) impact on lineholder schedules; (5) the economic impact on United; and (6) the impact on minority hiring. The findings of "unusual adverse impact" relate primarily to the considerations relevant to groups (1)

and (2). In reviewing the lower court's findings, therefore, we shall address primarily the possibility of furloughs and firings and the potential for involuntary transfers.

1. Immediate Reinstatement.

The district judge found that if the 1,400 class members were immediately reinstated by United, all incumbent attendants hired by United since March 7, 1977, would be furloughed. Those incumbents who were furloughed would suffer immediate financial consequences from loss of income. Further, it is possible that many of those furloughed as a result of reinstating the class, as well as those flight attendants already on furlough, would not be recalled before the five-year limit and would therefore effectively be "fired."

As discussed in Section III(A), *supra*, the appellants themselves seem to suggest that a discharge of incumbents because of relief granted to discrimination victims might constitute "unusual adverse impact." The combination of a very large class and an economically depressed airline industry might well result in a significant number of current United flight attendants losing their jobs. We find ample support in the record for this finding and for the district judge's conclusion that such an impact would be "unusually adverse."

Immediate reinstatement would also result in a large number of involuntary transfers. As indicated *supra*, United maintains eleven separate domiciles for which flight attendants "bid" based on their seniority. Working from the assumption that returning class members would seek assignment to the domicile nearest their current residence, the district judge found that 147 claimants would choose to go to Seattle, one of the most popular domiciles. If they did, thirty-five percent of the flight attendants currently domiciled in Seattle would be subject to involuntary transfer to another domicile. Those

subject to transfer would be all Seattle-based flight attendants hired after September 30, 1969.

Because the popular Miami domicile is considerably smaller than the Seattle one, the impact there would be even more striking. If the 143 claimants who live nearest the Miami domicile all returned, seventy-six percent of the current Miami domiciliaries would be subject to transfer. This would include all flight attendants currently stationed in Miami who were hired after February 28, 1966.

The effect of an involuntary transfer is to force a flight attendant either to disrupt his or her family and community life or to commute to the new domicile. There is evidence in the record of this case that many of these displaced incumbent flight attendants would resign their positions with United rather than suffer the disruption associated with transfer or incur the costs, in both time and money, involved in commuting.

Choosing to resign in the face of two equally unsatisfactory alternatives—relocating or commuting—may be marginally preferable to being furloughed for an extended time or effectively discharged upon the expiration of recall rights. The difference, however, is merely a matter of degree. There is ample evidence in the record to support the district judge's findings regarding the impact of involuntary transfers on incumbents and the likelihood that such transfers would result from the immediate reinstatement of the class members. We cannot say that the district judge abused his discretion in characterizing this impact as unusually adverse.

Of the other consequences of immediate reinstatement discussed by the district court, the most significant is the impact on minority flight attendants currently employed by United. Pursuant to a consent decree entered in 1976, *EEOC v. United Airlines, Inc.*, No. 73 C 973 (N.D.Ill. 1976), *aff'd*, 560 F.2d 224 (7th Cir. 1977), *cert. denied*,

434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 764 (1978), United has hired an increasing number of flight attendants who are members of minority groups in recent years. Accordingly, these persons have relatively low seniority. They would, therefore, be more affected as a group by the immediate reinstatement of the class than the other incumbent flight attendants. Evidence in the record suggests that immediate rehiring of all class members would decrease the percentage of minority flight attendants from fifteen to ten percent. Further, because of the many furloughs that would result from implementation of this remedy, there would be less or no hiring by United in the next several years and the number of minority members working as United flight attendants would not be increased by new hires.

The judge below did not find that the consequences to minority flight attendants would, by themselves, constitute "unusual adverse impact." Nonetheless, we believe the district judge correctly considered this impact to be significant. When it is considered along with the possibility of furloughs, possible firings, and involuntary transfers, the impact on minorities buttresses the district court's conclusion that "unusual adverse impact" would result if the class members were immediately reinstated.

2. Openings Proposal.

The claimants do not suggest that they will wait passively for openings to occur among the rank of flight attendants without regard to how long the delay in reinstatement might be. The class conditioned their openings proposal on all claimants being fully reinstated within two and one-half to three years. McDonald indicated that if that timetable were not met, she would "undoubtedly . . . petition the court to modify the decree." Second, all openings were to be filled by class members before any furloughed incumbent flight attendant was recalled to work. Third, class members were to receive

"front pay" consisting of full pay and benefits until all class members were reinstated.[9]

The proposal also required United to "take appropriate steps to encourage the creation of openings." Two specific suggestions were made by the class: initiation of an early retirement program and the creation of a continuing "shared work" program.

The district court found that it lacked power to impose either the early retirement or shared work program. Absent any allegation that the United-AFA collective bargaining agreement violates the Civil Rights Act or wrongfully perpetuates the effects of past discrimination, the court below lacked the power to rewrite the terms of that agreement to provide for either of the programs suggested by plaintiff class. *See Myers v. Gilman Paper Corp.*, 544 F.2d 837, 857 (5th Cir. 1977), *amended and modified on other grounds*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59.

Absent affirmative action to encourage openings, the district court found that the openings proposal was unworkable, primarily because of the two and one-half to three year time limit. The feasibility of meeting the time limit turns primarily on two factors: the anticipated attrition from the ranks of flight attendants and the anticipated growth in the total number of flight attendants required by United.

Experts for both the plaintiffs and United testified as to attrition rates. The plaintiffs' expert, Dr. Carl Hoffman, predicted an attrition of between 670 and 833 flight attendants by year-end 1983. These figures represent an attrition rate of approximately three and one-half percent. United's expert, however predicted that the attrition rate would be something under one percent over the next five years, resulting in 367 available places for flight attend-

[9] As indicated in Section I(B)(3), the district court has not yet resolved the issue of front pay.

ants. Judge Moran did not credit one expert over another. He noted that both were subject to challenge on methodological grounds, and "most importantly, both are subject to certain imponderables beyond the control of the airline or the flight attendants that will greatly affect the rates of attrition."

The failure to resolve definitively how much attrition will occur among United flight attendants is not critical, however, because it is clear that 1,400 class members could not be reinstated within the time frame set by McDonald without some growth in the total number of active flight attendants required by the airline.

United had originally projected an annual growth rate of four to five percent. This would have resulted in the recall of 102 furloughees in 1981. Instead, 125 flight attendants were furloughed in July, 1981. Another 350 flight attendants were furloughed in September, 1981, and because of the strike by the professional air traffic controllers and the resulting reduction in the number of United flights, another 547 were furloughed in October, 1981. United's "growth projections" for 1981 were accordingly off by 1,124 individuals.

United now projects *no* growth for the next few years. According to the brief submitted by the AFA, there are still 1,255 United flight attendants on furlough. It is apparent that, absent a dramatic change in the economies affecting the airline industry, it will be impossible for United both to recall those flight attendants currently on furlough and to provide places for the 1,400 class members within the two and one-half to three year limit set by the class. Even if the class members could all be reinstated within that period, which appears unlikely, the result is that some current furloughees would be effectively discharged at the expiration of their recall rights. This is the same effect that the district judge found, when considering immediate reinstatement of the class, to constitute "unusual adverse impact."

Even if the openings proposal were "workable," therefore it is likely that some furloughees would eventually lose their job with United. This effect would be exacerbated if the district court awards front pay to the class and United creates artificial vacancies by furloughing incumbent flight attendants. United has indicated that it would take such action in order to avoid paying full salaries to those waiting for reinstatement. Although no award of front pay has yet been made, this possibility is relevant because it suggests that the impact of the openings proposal would be virtually indistinguishable from that of immediate reinstatement insofar as furloughs and possible firings are concerned.

Further, even if the openings proposal were workable within the conditions set by the class, there is no indication that the impact, in terms of involuntary transfers, would be appreciably less than if the class members were reinstated immediately. The greatest attrition occurs among the more junior flight attendants. As a result, the majority of openings will occur at the less popular domiciles. Because of the significant competitive seniority that returning class members would have, they would generally be able to utilize that seniority to be stationed at the domicile of their choice. There is simply no guarantee that openings would occur at the domiciles that class members would request. If they did not, incumbents now stationed at those domiciles would have to be involuntarily transferred to the less popular domiciles where the openings had occurred.

The only other alternative would be for class members to wait until an opening occurred at the domicile of his or her choice or to accept employment wherever a vacancy occurred, regardless of domicile. The class members have not indicated a willingness to do either. The time limit set by the class precludes the first option which might, as the district court recognized, involve an inordinately long wait. Further, even if the class members indicated a will-

ingness to suffer such a long delay in reinstatement, United might be expected, if front pay were awarded, to create false vacancies to put the class members back to work at domiciles of their choice. The result in this case would be virtually the same as if the class members were immediately reinstated.

Both in terms of furloughs or firings and the potential for involuntary transfers, there is ample support in the record for the district court's conclusion that the impact on incumbents resulting from implementation of the openings proposal would be only slightly less than if the entire class were immediately reinstated. More importantly, there is support for the judge's conclusion that the conditions insisted upon by the class as part of the openings proposal simply cannot be met. Bearing in mind that, in *Teamsters*, the Supreme Court indicated that in "devising and implementing remedies under Title VII . . . a court must . . . determine the 'special blend of what is necessary, what is fair, and what is workable,'" 431 U.S. at 375, 97 S.Ct. at 1874 (citation omitted), we find no abuse of discretion in the district court's rejection of the class' openings proposal.

3. Relative Seniority.

Pursuant to the class' motion to reconsider, the district judge considered and rejected an alternative proposal which would have given class members the same "relative" seniority they had when they left United. Under this relative seniority proposal, a class member who was in the sixty-seventh percentile for seniority purposes when she left United because of the no-marriage rule would, upon reinstatement, be placed at that same percentile.[10]

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[10] The district court denied the motion to reconsider without opinion. We reject the plaintiffs' contention that the court's failure to issue an opinion constitutes "clear error" under *Franks*. The court had advised the parties, prior to the trial on reinstatement issues, that he would consider the full "gamut" of possible seniority

At the time of the plaintiffs' terminations, sixteen percent were in the top quarter of the seniority rankings, twenty-seven percent were in the second quarter, thirty-five percent were in the third quarter, and twenty-two percent were in the bottom quarter.

Under the remedy devised by the district court, approximately ninety-three percent of the claimants will be in the bottom quarter of the seniority list. The plaintiffs argue that stagnation at the top of the seniority list means that they will remain at the bottom of the list for the rest of their careers. They therefore suggest that the relative seniority proposal at least achieves the district court's apparent goal of placing them where they were when they left United, whereas the relief granted by the court below actually gives them far less.

The difficulty with the relative seniority proposal stems largely from the change in how flight attendants view their flying experience in the 1980's as compared to the 1960's. What was once viewed as a temporary, glamorous job is now considered a career position. As a result, a flight attendant who began working for United in 1966 had accrued as much relative seniority by late 1968 as a flight attendant who began in 1970 had by 1982. The relative seniority proposal effectively equates twenty months of experience fifteen years ago to twelve years of more recent experience. Such a result places a great burden on incumbents who were in no way responsible for United's no-marriage rule.

Whether that burden would, in a different economic setting, be consistent with the shared-burden rationale

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remedies. The detailed opinion issued by the district judge demonstrates that he fulfilled this promise. As our review of the relative seniority proposal indicates, *see infra*, its impact is different in only a matter of degree from the proposals discussed at length by the district court. We find no error in the district judge's failure to write yet another lengthy opinion concerning the same issues that had already been treated in depth in the memorandum opinion.

articulated in *Franks*, 424 U.S. at 777, 96 S.Ct. at 1270, need not be resolved because implementation of the relative seniority proposal would, in the context of this case, result in "unusual adverse impact" on incumbents. In light of the small attrition rate at United and, more importantly, the lack of anticipated growth in the total number of flight attendants required, the effect of granting the plaintiffs relative seniority would be to require the existence of 951 openings in the ranks of flight attendants before the most senior of the current furloughees would be recalled. Because there are currently 1,255 flight attendants on furlough, there would have to be over 2,000 openings for flight attendants within the five-year limit, at the conclusion of which furloughees lose their recall rights, in order for the class members to return to United without some percentage of incumbent furloughees losing their job as a result.

The relative seniority proposal, if implemented on an "openings" basis, as apparently the class intends, does not resolve the impossibility of reinstating the class members within the time limit set by the class. The district court found it unlikely that sufficient openings would occur to accommodate the class members if they were hired before any furloughees were recalled. Utilizing the relative seniority approach, some furloughees would be recalled before some of the least senior class members. As a result, *more* than 1,400 openings would be required to reinstate both the class and the more senior of the current furloughees within the time limit. The relative seniority proposal, implemented on an openings basis within the time limit set by the class, is even less workable than the openings approach presented by the class during the trial below.

To reintegrate immediately the 1,400 class members into the active work force, even with relative seniority, would differ from immediate recall with full seniority only in a matter of degree. The furlough of flight attend-

ants now in active service would be necessary. The possibility is strong that many of the furloughees, quite likely those laid-off as a result of the reinstatement of the plaintiffs and almost certainly some of the present furloughees, would not be recalled within the five years and would, therefore, lose their jobs.

Similarly, because many of the class members would enter the ranks of flight attendants with substantial seniority, the likelihood of involuntary transfers of incumbents remains extremely high. This is true whether reinstatement were implemented immediately or on an openings basis.

In summary, we conclude that those factors compelling a conclusion of unusual adverse impact under the immediate reinstatement or openings proposals are mitigated to only a slight extent if the class members are granted relative seniority. The remaining "unusual adverse impact" on the incumbents makes this remedy, under *Franks*, inappropriate and the district judge did not abuse his discretion in declining to adopt it.

IV. ISSUES RAISED ON CROSS-APPEAL

On cross-appeal, United urges that the district court erred in awarding the plaintiff class seniority from the date of original hire for purposes of compensation and various benefits such as the number of vacation days and number of passes a flight attendant receives.[11] Unlike competitive seniority, *see* Section I(B)(1) *supra*, the burden associated with this award of non-competitive seniority falls primarily on United rather than on incumbent flight attendants.

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[11] Referring to the terminology developed in Section I(B)(1), *supra*, seniority from date of original hire was awarded the class for purposes of company seniority and classification seniority utilized in the absolute sense. Apparently, compensation is the only variable determined by this absolute use of classification seniority.

United asserts that *Franks* requires a district court to "balance the equities" in awarding seniority relief and offers two arguments in support of its conclusion that the equities favoring the plaintiffs are few. As discussed in Section III(A) *supra*, *Franks* created a presumption in favor of full retroactive seniority relief, implemented on an openings basis, in Title VII cases. *Franks*, 424 U.S. at 779 n. 41, 96 S.Ct. at 1271 n. 41. Arguably, the approach taken by the *Teamsters* Court could be characterized as a balancing of equities. 431 U.S. at 374-76, 97 S.Ct. at 1874-75. The court below reconciled the language in *Franks* and *Teamsters* by applying the *Franks* presumption, requiring United and the AFA to carry the burden of demonstrating "unusual adverse impact," and relying on the factors enumerated in *Teamsters* as relevant to that showing. Absent any explicit statement in *Teamsters* that the standard enunciated in *Franks* was no longer viable, we believe the approach taken by the district court is correct and have followed the same mode of analysis on appeal. We are not persuaded, therefore, that United's characterization of this case as one involving a mere balancing of equities is correct.

Our reluctance to resolve this case by a balancing of equities is quite relevant to evaluation of one of the arguments posed by United. United stresses the equities in its favor: that the airline promptly abrogated the no-marriage rule once it became clear that the rule violated Title VII, and that, although other airlines had similar rules during the period that United's was in effect, only United is subject to a potential liability that includes an increase in annual operating expenses of approximately $21,000,000. United also stresses the change in how flight attendants view their position—what was once a job of limited duration is now a career position—and concludes that there is only a one-in-three chance that a flight attendant who married between 1965 and 1968 would still be flying for the airline, even if the no-marriage rule had never existed. In this regard, United finds it significant

that less than ten percent of the potential class members reapplied to United as preferred hires after abrogation of the rule.

Finally, United asserts that the incumbent flight attendants are extremely hostile to the class members and that such hostility, together with service reductions United will be forced to make as a result of the relief granted the class, will have a negative impact on the public served by the airline.

Although the judge below did not address all of these factors in the portion of his opinion discussing company seniority, the district court opinion, read as a whole, does recognize the "equities" favoring United. The conclusion drawn by Judge Moran regarding these issues differs from that of United primarily because the district court read *Franks* as mandating the fullest possible relief for the class. Because we concur with the district judge's reliance on, and interpretation of, *Franks*, we are not persuaded by United's argument that the district court failed to weigh properly the equities in this case.

The second argument raised by United in support of its contention that the award of non-competitive seniority was an abuse of the district court's discretion relies on *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), and *Ford Motor Co. v. EEOC*, —— U.S. ——, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982). United asserts that because many members of the plaintiff class did not individually file timely charges with the EEOC and did not subsequently return to United as "preferred" hires after abolition of the no-marrige rule, they have failed to meet the prerequisites necessary to an award of retroactive seniority for non-competitive purposes.[12]

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[12] United also relies on this argument as an alternative ground in support of the district court's judgment regarding competitive

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), the plaintiff, who had left United because of the no-marriage rule,[18] did not file a charge with the EEOC within ninety days. Approximately four years later, in 1972, she returned to United but was not granted retroactive seniority upon her return. The following year, Evans filed charges with the EEOC alleging that United had discriminated against her and continued to do so. The Supreme Court held that, because of Evans' failure to filed a timely charge before the EEOC in 1968, the airline's discriminatory action in discharging her was of no legal consequence. *Id.* at 558, 97 S.Ct. at 1889. Further, the Supreme Court held that Evans demonstrated no continuing violation of Title VII because she introduced no evidence that she was being treated differently, pursuant to United's seniority system, from other flight attendants—male or female—who had been discharged for non-discriminatory reasons and subsequently rehired. *Id.*

Evans is distinguishable from the present case in that *Evans* was not a class action whereas the present case is. It is well established that, in a Title VII class action, unnamed plaintiffs are not precluded from class membership merely because they did not individually file timely EEOC charges. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 396, 102 S.Ct. 1127, 1134, 71 L.Ed.2d 234 (1982); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 389 n. 6, 97 S.Ct. 2464, 2467 n. 6, 53 L.Ed.2d 423 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 771, 96 S.Ct. 1251, 1267, 47 L.Ed.2d 444 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370 n. 8, 45 L.Ed.2d 280 (1975). United recognizes this distinction yet urges that the failure of individual class

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seniority. Because we have resolved that issue on the grounds set forth in the district court opinion, we will not consider United's alternative ground in that context.

[18] Evans is a member of the claimant class in this case.

members to file timely EEOC charges is nonetheless relevant to the "balancing of equities" required in this case. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), is relevant to this prong of United's argument.

The plaintiff class in *Zipes* involved a large percentage of persons who had neither themselves filed charges with the EEOC nor been discharged, pursuant to Trans World Airlines' rule prohibiting mothers from employment as flight attendants, within ninety days preceding the filing of charges by other class members. This court had held that this subgroup of the plaintiff class was jurisdictionally barred from relying on Title VII. *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142 (7th Cir. 1978), *rev'd sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982).

While petitions for certiorari were pending on the jurisdictional issue, the plaintiff class and the airline reached a settlement agreement that was approved by the district court and by the Seventh Circuit. That agreement provided for retroactive seniority relief for the entire class, including those members whom the Seventh Circuit had held jurisdictionally barred from Title VII relief.

Although the Supreme Court reversed the Seventh Circuit's decision regarding jurisdiction, it affirmed this court's approval of the settlement agreement. *Zipes*, 455 U.S. at 401, 102 S.Ct. at 1136. Concurring in the result as to the award of retroactive seniority, Justice Powell wrote:

> [W]hen the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a district court should consider these equities in determin-

> ing whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities.

Id. at 401 n. 1, 102 S.Ct. at 1137 n. 1 (opinion of Powell, J., concurring in the judgment in No. 80-951).

The above-quoted language from Justice Powell's opinion forms the primary basis for United's argument that it is inequitable to award retroactive seniority for non-competitive purposes to the plaintiff class in this action. The argument is inapposite for two reasons. First, Justice Powell's remarks are directed to competitive rather than non-competitive seniority. Second, United overlooks the fact that the class members in this case are not in the same position of having "slept on their rights" as the subclass of plaintiffs in *Zipes*. The class membership in this case was carefully limited to include only flight attendants who had left United pursuant to the no-marriage rule *within the period from ninety days before the filing of EEOC charges* until United's abolition of the rule. Unlike the relevant subclass of plaintiffs in *Zipes*, *all* members of the class in the instant case have a timely EEOC charge upon which to rely. To penalize them for not having individually filed EEOC charges would be contrary to the well established rule that individual, timely filings are not essential to a class action. We therefore reject United's argument insofar as it rests on the premise that class members were remiss in not filing individual EEOC charges.

The third prong of United's argument is based on *Ford Motor Co. v. EEOC*, —— U.S. ——, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982). In that case, several women were denied employment at Ford. An EEOC charge was filed. Two of the women obtained other employment. Ford then offered each of them the position that had previously been wrongfully denied. Ford made no offer of retroactive seniority to the date of original hire. Reversing the Fourth

Circuit, the Supreme Court held that, absent unusual circumstances, an employer's unconditional offer of the job previously withheld ends the accrual of potential back pay liability.

United relies on *Ford*, by broad analogy, for the proposition that the failure of the plaintiffs to seek available rehire by United weighs the equitable balance in favor of the airline. We are not persuaded that *Ford* has relevance to the present case. Not only does this appeal not involve issues of back pay, but more importantly, it is not a case in which United unconditionally offered employment to any of the flight attendants who had left during the era of the no-marriage rule. United's "offer" was no more than a statement, in its publicity aimed at potential flight attendants, to the effect that priority would be given to applicants who had previously worked in positions involving "customer service." This is obviously something short of an unconditional offer of employment made directly to the victim of discrimination. Further, although the former flight attendants *may* have known that United had abandoned its no-marriage policy and *may* have known that they would be given hiring preference if they reapplied, neither of these facts is established in the record. We therefore conclude that *Ford* has little relevance to this case.

We conclude that the district judge did not abuse his discretion in construing *Franks* to require an award of seniority for non-competitive purposes from date of original hire. The judge below evaluated the increased costs to United occasioned by the relief ordered and found that, in light of United's recent assumption of increased compensation costs pursuant to collective bargaining,[14] the

[14] The district judge found that the relief ordered would result in less than a ten percent rise in gross flight compensation costs to United. In comparison to this figure, United's recent contract negotiations resulted in assumption of a twenty-three percent increase in 1980 and an additional ten percent increase in 1981.

economic impact on the airline could not be considered "unusually adverse." Although a greater measure of non-competitive than competitive seniority was awarded, the district judge sought to insure that each type of seniority relief was the maximum measure that would not result in "unusual adverse impact." We find no abuse of discretion, under *Franks*, in this approach.

V. DENIAL OF INJUNCTIVE RELIEF

In August, 1982, United indicated that on October 1, 1982, it would recall 175 furloughees. The class petitioned for a stay of the recall. The class proposed that plaintiffs with greater days-of-service seniority (the measure of competitive seniority awarded by the district court) should be recalled instead of the incumbent furloughees or, alternatively, that action such as denying the recalled furloughees the accrual of competitive seniority should be ordered to prevent deterioration of the class' competitive position. The district judge did not grant the sought relief and, according to the class, abused his discretion in so doing.

We find no abuse of discretion in the district judge's refusal to require that claimants be recalled in place of incumbent furloughees because, absent the results of *any* class membership hearings at that time, it would have been impossible to know if the claimants recalled would ultimately be found to be members of the class.

We similarly find that the district judge did not abuse his discretion in refusing to order that recalled furloughees be denied the accrual of competitive seniority. Such a denial would be contrary to the terms of the collective bargaining agreement between United and the AFA, and, absent any assertion of illegality in that agreement or an assent to the denial of competitive seniority, the district court lacked power to alter the terms of the agreement. *See Myers v. Gilman Paper Corp.*, 544 F.2d 837 (7th Cir. 1977), *amended and modified on other*

grounds, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59.

Two other forms of relief suggested by the class pertained to the granting of extra competitive seniority to claimants in light of the recall. The district judge declined to rule on these requests.

The first of the alternative suggestions was to permit claimants with greater seniority than the recalled furloughees to accrue competitive seniority from the date of the recall. The primary difficulty that would arise if such relief were granted is that if the 300 to 350 claimants with greater competitive seniority than the most senior furloughees were awarded this "extra" seniority, the relief bears a limited relationship to the recall which involved only 175 furloughees. If, on the other hand, the extra seniority were awarded only the 175 most senior of the claimants, the possibility exists that the beneficiaries of this seniority grant would subsequently be determined not to be members of the plaintiff class.

The second of the alternatives suggested by the class was to permit all claimants to begin accruing competitive seniority from the date of the recall or from the date of the district court's opinion on reinstatement questions issued. While this approach eliminates the difficulties associated with awarding extra seniority to just some of the class members, it substantially alters the reinstatement relief ordered by this district judge in his memorandum opinion. Because the district court's resolution of this extremely complicated case sought to grant class members the fullest possible seniority remedy without creating an "unusual adverse impact" on incumbents, it necessarily involved a careful balancing of rights and consequences. We cannot say that the district court abused its discretion in declining to alter that balance merely because 175 furloughees were recalled.

Although we find no abuse of discretion in the district court's failure to alter at this time the seniority remedy

granted, we are cognizant that many variables remain in this case. If the economic conditions affecting United, conditions that are largely responsible for the finding of "unusual adverse impact," take a drastic turn for the better and numerous furloughees are recalled, or if the class determination hearings stretch on for longer than anticipated, it is possible that the district judge will need to make adjustments as to when class members begin accruing competitive seniority. Nothing in this opinion, of course, precludes the district judge from ordering such additional relief upon a showing that modification of the original order is required.

CONCLUSION

Having considered all the arguments urged by the parties and intervenors on this appeal, for the reasons stated in the foregoing opinion, the judgments of the district court regarding the appropriate measure of seniority relief and the denial of injunctive relief are

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 70 C 1157

CAROLE ANDERSON ROMASANTA, *et al.*,

and

LIANE BUIX MCDONALD, on her own behalf and on behalf of others,
Plaintiffs,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant.

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

[Filed January 12, 1982]

MEMORANDUM AND ORDER

The original plaintiffs filed this action in 1970 challenging defendant United Air Line's rule requiring stewardesses to step down from their positions upon marriage. That same year the rule was held to violate the provisions of Title VII of the Civil Rights Act prohibiting discrimination in employment on the basis of gender. But only now, almost twelve years from the date of filing, has the question of remedies begun to be addressed. In May 1981 this court held a three-week evidentiary hearing concerning reinstatement of those former women employees forced to resign during the late 1960s upon their

marriages. The focus of that hearing was whether the granting of such relief would have an "unusual adverse impact" upon United and its current work force of flight attendants. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). What follows herein, in opinion form, are the court's findings of fact (pp. 11-44) and conclusions regarding reinstatement in this instance (pp. 44-53).

I. *INTRODUCTION*

This case is as old as Title VII of the Civil Rights Act itself; its origins date back to the mid-1960s. The dispute is over a rule which now can only be viewed as an historical anomaly. Until November 7, 1968 United Air Lines, Inc. ("United"), like most other airlines, required its women flight attendants to resign their positions upon their marriages.

From a contemporary perspective, it is almost a matter of faith that work rules such as the no-marriage policy are flatly inconsistent with the precepts of Title VII. These days the presence of married flight attendants aboard United's aircraft seems almost the rule and not the exception. No one disputes that these women have been easily integrated into the work force without diminishing the quality of services provided by the airline or causing a drop in demand for air travel. Even United must wonder why it adopted a work rule which forced it to bear the additional cost of training 8,500 new hires between 1945 and 1967. Binder, *Sex Discrimination in the Airline Industry: Title VII Flying High.* 59 Cal. L. Rev. 1091, 1101 n. 59 (1971).

But while the unlawfulness and inefficacy of the no-marriage rule is apparent today, the issue was not always considered so clear-cut. Legal challenges to the airline's policies were initiated as early as 1965 in arbitration proceedings. In this case certain of the class members filed grievances with the Equal Employment Opportunity Commission ("EEOC") as early as January 25, 1966.

McDonald v. United Air Lines, Inc., 587 F.2d 357, 361 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979). The Commission, however, struggled for years with the issue before concluding, only after extensive industry-wide hearings in 1968, that the no-marriage rule violated the Civil Rights Act. *Neal v. American Airlines, Inc.*, CCH Emp. Prac. Guide ¶ 6002 (1968); *Colvin v. Piedmont Aviation, Inc.*, CCH Emp. Prac. Guide ¶ 6003 (1968). At least two early court decisions upheld the practice. *See Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967); *Lansdale v. United Air Lines, Inc.*, 2 FEP Cases 462 (S.D. Fla. 1969), *rev'd per curiam*, 437 F.2d 454 (5th Cir. 1971).

In a case related to this one, *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970), *aff'd.* 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971), the courts first held the no-marriage rule illegal. With liability established in this action as early as 1970, this case should have long since been closed. But subsequent proceedings failed to proceed smoothly and the case has ripened to an age and to a dimension unparalleled by virtually any other Title VII lawsuit.

Not until 1978 was the present scope of the action finally defined. The case originally was filed by Carole Anderson Romasanta on behalf of herself and other former United flight attendants. In its early stage the litigation largely was sponsored by the flight attendants' union, then the Air Line Pilots' Association ("ALPA") and now known as the Association of Flight Attendants ("AFA"). The court initially refused to certify the Romasanta class, instead permitting twelve other former flight attendants to proceed "by way of joinder" as additional parties. When Romasanta refused to challenge that order, the decision was appealed by Liane Buix McDonald ("McDonald"), an excluded member of the putative Romasanta class, as an intervenor. In 1976 the Court of Appeals for the Seventh Circuit reversed the

district court's denial of class certification and remanded the case for further proceedings. *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915 (7th Cir. 1975), *aff'd. sub nom. United Air Lines v. McDonald*, 432 U.S. 385 (1977). McDonald has remained the current class representative to this date and AFA has now intervened to represent the interests of the current work force.

Upon remand the composition of the class was subject to still further dispute. At one point the district court included in the McDonald class only those former employees who were discharged by the airline. The exclusion of those former flight attendants who resigned from their positions because of the rule, rather than waiting to be fired, was also reversed by the Court of Appeals. In *McDonald v. United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), the court held that both discharged and resigned flight attendants should be included in the McDonald class. Accordingly, the case was once again remanded to the district court, the class now being composed of all those individuals terminated on account of marriage between October 27, 1965 and November 7, 1968.

In 1979 the case was transferred to this court for purposes of awarding class-wide relief. To contend, as plaintiffs do, that United has wrongfully drawn out these procedings as a delaying action solely to frustrate meaningful relief to the class, overstates the matter. In a real sense, United had successfully litigated this action prior to 1976, confining it to finite and limited dimensions, and, until 1978, restricted the scope of the class. Only after that time did the gargantuan proportions of this case become established. What cannot be overstated, however, is the uniqueness of this action as it now stands. The class is enormous—comprising as many as 1800 former women flight attendants. An unprecedented number of those employees now seek reinstatement with full seniority. Based on a random sampling of class members during

discovery in the past two years, approximately 1400 class members are still interested in returning to their old jobs after some 13 to 16 years of litigation.

Finally, this case is unique in the ironies it now presents. The Civil Rights Act's prohibitions against sex-based discrimination and this case grew out of the "women's movement" of the late 1960s and the past decade. That movement was the motivating cause of unparalleled changes in women's roles in American society, including the role of the airline flight attendant. In this case, however, because of the passage of time and the pressures of economics, the result has an unfortunate twist. One class of women, the claimants, are pitted against another class of women, the current flight attendants, for a limited number of job positions at the airline. The "sisterhood" that might otherwise exist between these two groups has now been frustrated by competition for existing positions, perhaps the last casualty of the no-marriage rule.

II. *LEGAL PRINCIPLES*

The legal parameters of permissible relief are defined by the purposes of Title VII: "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). As the Supreme Court noted in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (*"Franks"*), the attainment of this "make whole" objective requires "that persons aggrieved by the consequences and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Franks, supra* at 764. To this end, the *Franks* court concluded that an award of retroactive seniority is presumptively warranted. *Franks, supra* at 766 ("It can hardly be questioned that ordinarily such relief will be necessary to achieve the 'make whole' purposes of the

Act."). However, the inquiry here is just not that simple. The Supreme Court also recognized that the interests of incumbent employees must be considered in determining an appropriate remedy. While retroactive seniority cannot be withheld merely because incumbents may be affected adversely, the court clearly stated that an award of seniority status is not required in all circumstances. *Franks*, *supra* at 770, 779. Rather, the fashioning of appropriate Title VII remedies has been left to "the sound equitable discretion of the district courts." *Franks*, *supra* at 770.

In *Franks*, and later in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (*"Teamsters"*), the Court attempted to give some substance to its general equitable charge. In a now famous footnote, the *Franks* Court stated:

> [I]n exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.

Franks, *supra* at 779, n. 41. In *Teamsters* the court added further content by citing prior language from *Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1974), commanding courts to "look to practical realities" such as the "number of victims, the number of non-victim employees affected and the alternatives available to them" to determine the "special blend of what is necessary, what is fair and what is workable." *Teamsters*, *supra* at 375 and 376, n. 62.

All of the parties have sought to add further content to the holdings of *Franks* and *Teamsters*; plaintiff, by con-

tending that the issue is "when" and not "whether" reinstatement will occur, and United and the union claiming that after *Teamsters* victims of employment discrimination cannot be reinstated if that will cause the displacement of existing employees. Neither argument is determinative. Plaintiff's suggestion that reinstatement is automatic was specifically rejected in *Franks*. The union's suggestion of a "no-bumping" rule has been adopted by at least one federal court of appeals. In *Sledge v. J. P. Stevens & Co., Inc.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979), the Fourth Circuit rejected a district court decree that modified an employer's layoff policy by providing that present black employees, who on the basis of their plant seniority would otherwise be laid off, could bump non-minority employees with greater seniority. The *Sledge* court cited an earlier Fourth Circuit decision which had announced a "no-bumping" rule, stating:

> "[B]umping" is an unsettling process. Its domino effect adversely affects employees who have done no wrong and who, indeed, may have been victims of discrimination.

Sledge, *supra* at 652, *citing Patterson v. American Tobacco Co.*, 535 F.2d 257, 268 (4th Cir. 1976), *modified on other grounds*, 586 F.2d 300 (4th Cir. 1978).[1] The *Patterson* case is, in turn, premised upon a decision of the Fifth Circuit, *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969),

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[1] *See also, Page v. Bolger*, —— F.2d ——, 21 FEP Cases 780, 786 (4th Cir. 1979) *aff'd. rehearing en banc*, 645 F.2d 227 (4th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (1981); Shortt v. County of Arlington, Va., 589 F.2d 779, 782 (4th Cir. 1978). *Accord*, Reed v. Arlington Hotel Co., 476 F.2d 721, 726 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973). In *Reed*, however, the Eighth Circuit merely reversed a "super-seniority" award causing displacement of incumbent workers in that instance. The *Reed* court did not purport to establish an absolute "no-bumping" rule.

cert. denied, 397 U.S. 919 (1970), decided prior to *Franks* and *Teamsters*, in which the court held:

> White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be used only with respect to new job openings. This solution accords with the purpose and history of the legislation.

Papermakers, *supra* at 988.

The Fourth Circuit's "no-bumping" rule has been rejected by other courts, *see*, *e.g.*, *Criswell v. Western Airlines, Inc.*, 514 F. Supp. 384, 394 (C.D. Cal. 1981),[2] and, of course, is not controlling herein.[3] The application of an

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[2] In *Criswell*, *supra*, two pilots brought claims for reinstatement under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The district court, citing *Franks v. Bowman Transportation*, granted such relief with the express recognition that other employees would be displaced. The court stated:

> [T]he Court has considered Western's claim that . . . reinstatement will cause displacement of less senior pilots and the ultimate furlough of two active pilots at the bottom of the pilot seniority list. Although such a result is unfortunate and may be inevitable in a shrinking economy, the Court must assume that such a possibility was within the contemplation of Congress in enacting the ADEA. Such displacement is not a sufficient reason not to fully effectuate the ADEA.

Criswell, *supra*, at 394.

But see, Moseley v. Goodyear Tire & Rubber Co., 612 F.2d 187, 191 (5th Cir. 1980), where the Fifth Circuit appears to have followed the Fourth in fashioning a rigid "no-bumping" rule.

[3] Alternatively, plaintiff's suggestion that the Seventh Circuit's approval of settlement decrees calling for reinstatement with seniority in recent cases involving American Airlines and Trans World Airlines, *see* Airline Stewards and Stewardesses Ass'n., Local 550 v. American Airlines, Inc., 573 F.2d 960 (7th Cir.), *cert. denied*, Ass'n. of Professional Flight Attendants v. Airline Stewards and Stewardesses Assoc., 439 U.S. 876 (1978) ("American"); Airline Stewards & Stewardesses Ass'n., Local 550 v. Trans World Airlines, Inc., 630 F.2d 1164 (7th Cir. 1980) ("TWA"), mandates reinstatement here must be rejected. In neither *American*

absolute "no-bumping" rule is hardly consistent with the Supreme Court's mandate in *Franks* and *Teamsters* that district courts are to exercise their own discretion, based on equitable principles, in fashioning relief under Title VII. A hallmark of equity is its flexibility—the ability to examine the "practical realities" to determine "what is necessary" and "what is fair." *Lemon v. Kurtzman, supra.* This court recognizes that a decree which causes the displacement of incumbent employees impacts on interests of those workers differently than an order which merely affects certain terms and conditions of continuing employment. That recognition, and the conclusion that flows from it—that such decrees should be used sparingly —is consistent with equitable principles. The existence of a hard and fast rule precluding "bumping" in all circumstances is not, [*sic*] and this court declines to follow the lead of the Fourth Circuit.

Accordingly, it is within the legal context of presumptive necessity for reinstatement with seniority absent "unusual adverse impact" that plaintiff McDonald's proposal for relief and the evidence presented at the hearing have been considered.

III. *PLAINTIFF'S PROPOSAL FOR REINSTATEMENT*

In light of the extraordinary circumstances of this case, plaintiff has not proposed to the court that her class members be reinstated immediately upon a determination of their entitlement regardless of the availability of openings at United. Instead, to cushion the potential impact of reinstatement, McDonald's proposal is slightly more limited. What follows is a brief review of the specifics of that proposal and a review of some of the over-arching

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nor *TWA* did incumbent flight attendants face the loss of their jobs by virtue of reinstatement with retroactive seniority. Moreover, both *American* and *TWA* were decided on principles governing the review of settlement agreements and not Title VII generally.

difficulties in implementing that plan in light of the evidence adduced at trial.

A. *Plaintiff's Suggestions Regarding Reinstatement*

Plaintiff's basic premise is that all claimants whose employment as United flight attendants during the late 1960s terminated because of United's no-marriage rule are entitled to an offer of reinstatement with restoration of their original flight attendant and company-wide seniority dates. As individual claimants are identified as victims of the rule in individual entitlement hearings (or by a later settlement agreement), McDonald requests that these women be offered retraining at United's training center. Plaintiff asks that United be compelled to operate that training center at full capacity until all of the "entitlees" are reintegrated into the work force.

The most significant element of the proposal is its "openings" feature. Specifically, McDonald proposes that, as an alternative to immediate reinstatement, reintegration of retrained class members should occur as there are openings in United's flight attendant work force. All of these openings would be filled from the pool of retrained claimants instead of by new hires. And although McDonald does not expressly so state in her proposal, all available openings would also go to the claimants before being filled by current United flight attendants returning from furlough status. As a condition for this "openings" compromise, McDonald requests that, until an entitlee is reinstated, she shall accrue "front pay" as well as other benefits (including seniority, sick pay, pension, vacation time, and passes), as does a flight attendant of comparable company and flight attendant seniority.

Finally, to assure that reinstatements occur as expeditiously as possible, McDonald incorporates into her plan the requirement that United be compelled to take appropriate steps to encourage the creation of openings. Two specific suggestions raised by McDonald are the "initia-

tion of an early retirement program" and the "creation of a continuing 'shared-work' program" akin to the Partnership Time-Off ("PTO") plan now in use at the airline. Plaintiff also requests additional safeguards such as the imposition of periodic reporting requirements on United, access to flight attendant requirements projections and a decree forbidding both United and AFA from discriminating or retaliating in any way against a returning class member.

B. *Feasibility of the McDonald Proposal Not Considering Any Impact on the Current Work Force*

The evidentiary hearing conducted in May featured the presentation of two distinct cases. The union and the airline presented their cases based on two assumptions: (1) the immediate reinstatement of (2) approximately 1400 class members. McDonald's case, however, rested on different premises: reinstatement only as openings occur in the present work force (subject to a reasonable time limit) and the existence of only 1069 claimants seeking reinstatement.[4] During trial plaintiff's counsel characterized AFA's and United's demonstration of the impact of immediate reinstatement of 1400 plaintiffs as a "colossal waste of time." Tr. at 1278. This court does not agree. Given the significant problems in implementing the McDonald proposal as presently structured, the presentation of evidence concerning the impact of immediate reinstatement was both helpful and necessary.

Two major difficulties with plaintiff's proposed reinstatement scheme exist independent of any impact it might have on United and its current work force. The plan's reliance on shared work and early retirement is misplaced. More importantly, the timetable for reinstatement is unrealistic.

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[4] The resolution of the parties' dispute over the conflicting estimates of the number of claimants who are likely to accept reinstatement, if offered, is discussed below, *infra*, at n.16.

1. *The Reliance on Shared Work and Early Retirement*

Plaintiff's suggestion of a continuing shared work program at United is modeled on the current Partnership Time-Off Program instituted at the airline in 1980. The program's origin was a union's response to United's February 1980 notice that due to higher operating costs and less than optimistic business projections it would be forced to furlough approximately 200 flight attendants. Tr. 690-692. In response to what was perceived to be a short term furlough situation and United's demand for a certain dollar amount in payroll savings, AFA suggested the initiation of the program. Tr. 691-692. According to Susan Rohde, the Master Executive Council Chairperson of the AFA, PTO was proposed as a "job-sharing concept offered to flight attendants on a voluntary basis for the sole purpose of avoiding what we thought at the time was going to be a temporary furlough." Tr. 692.

In operation PTO is a shared-work program in which two flight attendants, a junior and a senior, voluntarily agree to form a pair to split the senior flight attendant's monthly flying schedule. As two flight attendants now cover one line of flying, the removal of the junior flight attendant from the bidding roster requires an additional flight attendant to cover the second attendant's line of flying (assuming, of course, a constant number of lines). In the program full seniority is accrued and full insurance and pension benefits are retained by each member of the partnership pair. Sick leave and vacation time are divided between the attendants equally. Pay for the lines of flying is awarded on the basis of the senior partner's pay rate and allocated between the partners as they agree. The partnership pair itself is also responsible for determining which flights are flown by each partner. McDonald Ex. 17.

If the PTO program is considered as a device to prevent the furloughing of current flight attendants, the

program must be characterized as a considerable success. The program eliminated the need for 125 of the planned 200 furloughs in April 1980, when it was implemented. Successive renewals of the PTO program were also helpful in forestalling furloughs. In August 1980, 130 positions were saved out of a planned furlough of 275 attendants. In September 1980, 110 furloughs were avoided using the PTO program, and in May 1981 the need for a still further furlough of 200 flight attendants was totally eliminated.[5] AFA Ex. 11.

Certainly the track record of PTO lends a basis for plaintiff's suggestion that additional manpower demands theoretically can be created (or additional cutbacks avoided) by the incorporation of a like program in any reinstatement decree. As a practical matter, however, linking any hopes of prompt reinstatement to a shared-work program seems unwise.

An on-going part-time or shared-work arrangement modifies the basic contractual understanding existing between United's flight attendants (as represented by AFA) and the airline.[6] The union correctly notes that the find-

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[5] Stating that PTO eliminated the need for a substantial number of furloughs may, in some respects, overstate the case. Lagging consumer demand in the airline industry has caused a continuing series of furloughs at United. In a real sense, therefore, the PTO program has only postponed the date of furlough for some flight attendants.

The PTO program has also been used to facilitate the early recall of furloughed attendants from January to April 1981. Tr. at 64.

[6] The program represents a change in the provisions of United's collective bargaining agreement concerning compensation (§ 5), vacations and sick leave (§§ 18-19), and most directly those terms covering flight assignments and scheduling (§ 9). AFA Ex. 1. Indeed, plaintiff's assertion that PTO does not change the agreement, (Pl. Post-Trial Br. at 75 n. 84), is contrary to the understanding of both parties to that instrument. Tr. 63, 696.

ing that United engaged in an unlawful employment practice by enforcing its no-marriage rule does not endow the court with *carte blanche* remedial authority to rewrite the terms of the United-AFA collective bargaining agreement or to rearrange existing terms and conditions of employment. As the court noted in *Meyers v. Gilman Paper Corp.*, 544 F.2d 837, 857 (5th Cir. 1977), *amended and modified on other grounds*, 556 F.2d 758 (1977):

> A court in considering prospective relief is not automatically empowered to make wholesale changes in agreements negotiated by the employees' exclusive bargaining agents . . . . Allowing such changes without findings of inadequacy in the revised agreements would conflict with the policies reflected in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*
>
> We are reminded that while Title VII expresses an important national policy, it does not exist in a vacuum. Important national policies also emanate from the NLRA, among them the principle that terms and conditions of employment are to be shaped by the employer and the exclusive bargaining representative of its employees.

Meyers, 544 F.2d at 857.

Plaintiff has not suggested that the current terms of the United-AFA collective bargaining agreement violate the Civil Rights Act, or in any way wrongfully perpetuate any lingering discriminatory effects of United's no-marriage rule. Accordingly, it is not the province of the court to superimpose modified terms and conditions of employment, in the form of a mandatory shared-work program, to ameliorate the equitable dilemma posed by reinstatement.

A continuing shared-work arrangement in any reinstatement decree is dependent on the voluntary coopera-

tion of at least the union and the incumbent employees.[7] Neither's cooperation is likely. At the hearing Chairperson Rohde repeatedly reiterated the union's opposition to any long-term PTO-type program. Tr. 699, 2325. She noted that AFA had previously been approached by United in hopes of initiating a part-time work arrangement, and not until it became necessary to participate in such a program as a condition for saving the positions of incumbents was AFA amenable to such a solution.

More importantly, the success of PTO, or any similar voluntary program, is completely dependent on current flight attendants volunteering for the program. Although the program has achieved a good deal of success, it has generally not been so fully subscribed as to eliminate the need for furloughs. Flight attendants participation in the PTO program is largely determined by the preferences of the present work force for a part-time arrangement along the lines of PTO. For those who can afford to forego a full-time salary for a limited duration PTO offers several benefits. Flight attendants in the program may accrue full seniority and other benefits while working part-time. The junior partners in the pairing benefit from the ability to fly the schedule of their more senior partner. The benefits of this program, however, diminish when it is viewed as a long-term proposition. At least one flight attendant testified at the hearing that while PTO was an initially desirable option she did not continue in the program because she couldn't afford to be paid only partial wages. As the program increases in duration her experience likely will become more prevalent.

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[7] Assuming AFA's acquiescence to a continued form of shared work could be obtained, notwithstanding the provisions of its collective bargaining agreement, compelling United's participation might be less troublesome in light of the fact that it is the alleged wrongdoer in this action, and the rights of the "innocent" incumbent employees would not be as directly impinged.

Also, while the current level of participation in the program is attributable to the economic advantages of the program, it does appear to the court that willingness to join that program is influenced by a desire among the current flight attendants to save the active positions of their colleagues. Insofar as this motivation may have contributed to the success of the program, it is likely to diminish once the effect of shared work is to promote openings for the claimants rather than reduce the number of furloughees. Several witnesses at trial testified to the resentment of the current work force toward the claimants, in their efforts to secure reinstatement.[8] At the least, the collegiality that exists between flight attendants does not blunt the inevitable competition between incumbent and claimant. The court believes that if voluntary shared-work arrangements were to be employed as part of a reinstatement effort for the class members, the subscription to that program, and thus its effectiveness in creating openings, would be diminished.

For these reasons the court has not looked to either a voluntary or involuntary program of shared work as a means to facilitate the implementation of reinstatement. Involuntary shared work is beyond the power of the court to compel. Voluntary shared work just is not a realistic alternative in the current circumstances.

For a much simpler reason the court has not looked to an early retirement program as a significant source of aid in reinstating class members. Currently, the AFA-

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[8] On several occasions testimony was offered which purported to illustrate the hostility of the incumbent work force to the class members. Such hostility is not, of course, a cognizable ground, either in law or equity, to bar reinstatement. Accordingly, evidence of employee animus has not been considered for the purpose of demonstrating "unusual adverse impact." Such evidence is, however, relevant in evaluating whether current employees would participate in a voluntary program ostensibly established for the benefit of the claimants.

United collective bargaining agreement contains provisions for early retirement at age 50. AFA Ex. 1 at 209. Susan Rohde testified that the early retirement incentives have, to this point, been unsuccessful in inducing senior flight attendants to leave their positions. Tr. 801. Further increases in the early retirement incentives are a matter for collective bargaining, not for judicial decree.

2. *McDonald's Proposed Timetable for Reinstatement*

A central condition to McDonald's "openings" proposal is that reinstatement of all entitlees be accomplished within two and one-half to three years after the issuance of a decree. Based on current projections of future growth at United and current rates of attrition from the present work force, McDonald believes that enough openings will be created to accomplish that result. However, she notes, "If, however, these projections are off . . . plaintiff undoubtedly will petition the court to modify the decree." (McDonald Post-Trial Brief at 72.) Not surprisingly, the union and United both claim that the projected time span is wholly unrealistic.

Plaintiff's reliance on future growth at the airline to supply many of the needed openings is based on the testimony of Edward Beamish, senior vice-president in charge of corporate planning at United. Beamish, who was the only witness to testify as to long-term flight attendant needs at United, was "cautiously optimistic" about United's growth prospects. Tr. 17. He saw the stabilization of fuel costs, the country's long-term economic prospects and the effects of the airline deregulation as all indicating a growth for United on a projected basis of 4 to 5 per cent per year in terms of available seat miles ("ASM"). Tr. 21, 34-36. Beamish further testified that the growth in ASMs would translate fairly well into increases in the airline's demand for flight attendants.[9]

[9] McDonald also hinges her expectation of growth at United on certain statements of Richard Ferris, President of UAL, Inc. in

United's next witness, Robert Wertheimer, comptroller for in-flight services, confirmed this correlation and provided specific figures for projected flight attendant requirements. Based on the 4 to 5 per cent assumption of growth provided to him by Beamish, and an assumed attrition rate of 1.3 per cent from the current work force, Wertheimer estimated a need for 333 additional flight attendants in 1982, 466 in 1983, 594 in 1984 and another 594 flight attendants in 1985. United Ex. 3.

Certainly, if Beamish's prediction of growth and Wertheimer's forecast of additional flight attendant needs proved correct, there would exist a favorable environment for promptly reinstating the class members within the time frame of McDonald's proposal. Unfortunately, current trends at the airline and in the national economy in general suggest that these projections are unreliable.

United's prediction of current and continued growth has been proven wrong by events. Instead of recalls of 102 flight attendants as planned in 1981, an additional 125 flight attendants were furloughed in July 1981, 350 in September 1981, and another 547 in October 1981.[10] More flight attendants would have been laid off but for the considerable success of the PTO program in reducing sur-

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Friendly Times, United's company newsletter. Those predictions of growth, which are more in the nature of an inspirational charge to United's employees, have not come to pass, nor have they been given great weight here.

[10] The October 1, 1981 furlough of 547 flight attendants was caused by the strike of the professional air traffic controllers ("PATCO") and the commensurate reduction in the number of United's flights ordered by the Federal Aviation Administration ("FAA"). Wertheimer Aff. of 9/15/81. This latest furlough has been regarded here as a temporary phenomenon. The court can only assume that United was flying a maximum schedule before the strike, that the carrier would return to an approximately equivalent level of flying upon elimination of the flight restrictions resulting from the strike, and concommitantly, recall these 547 employees.

pluses in the work force. The fact is that United has had no new openings for flight attendants since October 1979, when the last of the current workers were hired. Since then over 1500 furloughs have occurred. For the year 1981 Beamish's and Wertheimer's projections of flight attendant needs were off by 1124 individuals. Obviously, given the current volatility in the air travel industry, as well as the national economy in general, United has been no more able to accurately predict its future manpower needs than other concerns. While this court certainly is no better seer of future trends than United's forecasters, the facts are that the airline's business has shrunk instead of grown and that it has much catching up to do in the immediate future to reattain its former size before it realizes any growth. Although plaintiff has characterized United's projections of growth as "conservative," at this point these projections have been unduly optimistic.

If, however, United has overestimated its future manpower needs in terms of anticipated growth, it has perhaps understated those needs in terms of projected attrition from the projected work force. Much trial time was devoted to the different projections of attrition by plaintiff's expert, Dr. Carl Hoffman, and United's expert, Dr. George Neumann. Dr. Hoffman's testimony was based on information provided to him by United in the form of the airline's "out-of-service" listing. Using the termination rates for flight attendants in 1978 and 1979, Hoffman predicted an attrition of between 670 to 833 flight attendants by year-end 1983. Hoffman arrived at these figures by computing termination rates for flight attendants, by years of seniority, from United's experience in 1978 and 1979.

Dr. Hoffman's methodology was criticized by Dr. Neumann, an economist at the University of Chicago's Graduate School of Business. According to Neumann, Hoffman erred in basing his calculations only on the experience of two years, 1978-79. Neumann, in arriving at his own

predictions, based his study on flight attendant attrition rates for the entire period between 1972 and 1980 and his own projected rate of attrition for the period proposed in McDonald's timetable for reinstatement was significantly lower than that suggested by Dr. Hoffman. Observing that annual attrition rates had fallen dramatically over this period, from a high of 11.40 per cent in 1972 to a low of 1.31 per cent in 1980, Neumann then projected attrition rates of 1.16 per cent in 1982, 0.93 per cent in 1983, 0.75 per cent in 1984 and 0.60 per cent in 1985. United Ex. 37. On these estimates, and the assumption of no growth at the carrier, Neumann predicted that 367 spots would become available in the next five years. Tr. 2202. At that rate, assuming 1480 class members would be reinstated, it would take almost 20 years to reintegrate them into the work force under McDonald's proposal. On cross examination Dr. Neumann admitted that had the termination rates for 1972 (an apparently unusually high rate of terminations) and 1980 (an apparently unusually low rate) been disregarded, the attrition rate at United had remained relatively stable at approximately 4 per cent per year, a percentage substantially similar to the rate adopted by Dr. Hoffman. United Ex. 37. On the other hand, Dr. Neumann also noted that his own methodology had been more accurate in predicting the current termination rate for 1981. Tr. 2204.

The court does not review this testimony as a prelude to conclusively determining which of the competing forecasted attrition rates is correct. Both Dr. Hoffman's and Dr. Neumann's testimony have strong appeal. Both are, however, subject to challenge on methodological grounds, and, most importantly, both are subject to certain imponderables beyond the control of the airline or the flight attendants that will greatly affect the rates of attrition. Perhaps all that may be drawn from the testimony is that United's attrition rate may continue in the approximately 1 per cent per year range while national unemployment remains high and is unlikely to rise much higher

than the conservative 3.5 per cent projection suggested by Dr. Hoffman. The important point to be drawn from this evidence is that the impact of reinstatement in this case could be cushioned by plaintiff's "openings" proposal only in the most favorable of circumstances—both sustained growth at United and a high attrition rate.[11] The realization of either is highly improbable at this point. Accordingly, the impact of reinstatement must be considered under the "best" and "worst" cases scenarios.

IV. *THE IMPACT OF REINSTATEMENT*

A. *The Position of Flight Attendant Generally*

In some respects the content of the flight attendant position is quite familiar to the general public. Airline passengers see a flight attendant serving an in-flight meal or cautioning a passenger to "fasten your seatbelt and return the seatback to the upright position." Although not many have viewed flight attendants fulfilling their responsibilities in emergency situations aboard aircraft, almost all travelers are cognizant that these individuals have been trained extensively for these situations should they arise. In contrast, the current hearing has focused on those aspects of the position of a flight attendant generally unknown to the flying public, but of great importance to those holding flight attendant positions.

In the context of this, an equitable hearing, it is of more than passing interest to note that the position has changed dramatically over the term of this lawsuit. In this case the claimants are seeking to return to a much improved position, very different from the one they left. For example, the last decade witnessed an unprecedented

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[11] Regardless of whether the most optimistic attrition rule suggested by Dr. Hoffman is assumed, or the lower rate supplied by Dr. Neumann, attrition alone will not create sufficient space in United's flight attendant work force to reinstate 1400 claimants within the projected time period. Sustained growth of the airline is a necessary condition to the success of McDonald's plan.

change in the flight attendant scale. At United Air Lines the pay in 1968 was $345 a month for 70 hours of actual flying time, Tr. 714, and actually was declining in real terms during the latter part of the 1960s. Tr. at 1214. While compensation levels increased only gradually during the immediate period thereafter, they rose dramatically in the mid-1970s and since then have kept ahead of inflation. AFA Ex. 18; Tr. 715, 1214-15. The increases in pay have taken the form not only of direct improvements in the monthly pay rates, but also of indirect compensation such as the increased availability of premium pay positions, compensation for boarding time spent on the ground before takeoff, holiday pay and compensation for understaffed flights. Additional steps were added to the pay scales to provide a further reward for length of service at the airline. AFA Ex. 18.

Significant changes also have occurred in the area of pension and retirement benefits. Prior to 1972 United offered only a minimum retirement plan funded solely by employee contributions, with a return on those contributions of only 3 per cent. AFA Ex. 19. Thereafter, United funded the pension plan, but at very modest rates, providing relatively few benefits. A significant breakthrough was made in 1976, during the negotiations between the union and United which concluded in that year's collective bargaining agreement. At that time United agreed to past fund for prior years of service, AFA Ex. 19, and benefits improved almost threefold. Tr. 719. Subsequent collective bargaining agreements have brought additional improvements to the flight attendants' retirement package.[12]

These improvements coincide with, and probably were caused by, a significant change in the way the flight at-

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[12] Some other change in the jobs over the course of the 1970s include improvements in working conditions, such as the availability of single room accommodations on "layovers," reductions in the number of attendants required to serve "reserve" status, and additional pay protections against flight cancellations.

tendants themselves viewed their positions. As Susan Rohde stated, the job, which was regarded as one "that you came and you flew for a year or two. Then you quit and you went off and did something else," became viewed as a long-term career. Tr. 714.[18] As the perspective of flight attendants changed to a more career-oriented outlook, there came greater impetus for the changes in the terms and conditions of employment described above.

In determining the "equities" of reinstatement with full seniority, the court has recognized that the claimants are seeking to return to a job which is more lucrative, more permanent and generally more desirable than the one they were forced to leave. That the claimants might to some extent reap a "windfall" through reinstatement is not troubling in the abstract given the unfairness of United's past employment practice. But considerations of fairness demand the court to be cognizant of the fact that this windfall would come at the expense of the current workers, particularly the more senior attendants, who played a large role in securing these job-related improvements.

An analysis of the specific content of the position of flight attendant must begin with a description of its system of seniority. Although that concept is of importance in many jobs, it is singularly significant in shaping the flight attendant experience. Seniority determines what flights the attendants fly, how much they are paid, and, in many instances, where they may live. Within the flight

[18] While the flight attendants' attitudes toward their employment understandably have changed over the past decade, there is nothing to suggest that had they been able to continue flying, the class members would not have been an integral part of this change in attitude. Of course, a major reason that job was viewed as short-term during the sixties was precisely because United's practices, such as the no-marriage rule, made it impractical to view the job otherwise. Edith Lauterbach, the flight attendant currently at the top of United's seniority list, attributed the emerging perspective of flight attendants, at least in part, to presence of married flight attendants in the work force after 1969. Tr. at 1216.

attendant job classification there is only one level, without merit advancements or bonuses. The only way to "move up" is to accrue seniority. As described by Susan Rohde, seniority is "the entire job. The entire job is hinged on seniority. It is the most important thing that is involved with the work and the job. It is what the collective bargaining agreement is built on." Tr. 685.

At United, several different seniority systems exist contemporaneously to define the job. Certain aspects of the flight attendant's position are determined by "company" seniority, that is, seniority based on all service with the airline, and not necessarily in the capacity as a flight attendant. Company seniority determines the number of free flight passes a flight attendant is eligible for, as well as the number of vacation days. AFA Ex. 3. Other conditions of employment are defined by "classification" seniority, *i.e.*, the seniority credited to an employee for time worked as a flight attendant. Classification seniority operates both in an absolute and relative context. For example, rates of pay are directly determined by absolute classification seniority. A flight attendant receives compensation increases on each seniority anniversary date up to a current maximum seniority bracket of 14 years of service.

Most flight attendant working conditions are determined by relative seniority, either on a system-wide basis or within the flight attendant's "domicile."[14] Relative system-wide seniority governs two fundamental aspects of

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[14] Although it is headquartered in Chicago, United, like other airlines, bases its flight attendants in several cities or "domiciles" throughout the nation as its route structure requires. The size of each domicile varies considerably dependent on the number of flights serviced by the base. Currently, United bases its flight attendants in eleven domiciles (of which three, Seattle, San Francisco and Los Angeles are further divided into "sub-domiciles" for United's domestic and Hawaiian operations).

the job—furloughs (and furlough recalls) and voluntary transfers between domiciles. When furloughs are necessary, eligibility is determined by inverse seniority order, the most junior attendants being furloughed first and recalled last. AFA Ex. 1; § 21A; Tr. 686. In addition, after the first nine months of employment as a flight attendant United permits its attendants to transfer between domiciles on a space-available basis. These inter-domicile transfers are determined by relative system seniority.[15]

The most significant day-to-day aspects of the job turn on relative domicile seniority. Most importantly, the determination of which flight attendants are "lineholders" and which serve "reserve" is made on this basis. While the substance and difficulties of reserve are discussed more fully later, it suffices here to note that this distinction is the most fundamental that can be drawn among the flight attendant work force.

Individual schedules are similarly determined by relative domicile seniority. On a monthly basis the airline, in conjunction with the union, determines a finite number of lines of flying for each domicile. Those lines, which includes fixed regular schedules as well as reserve schedules, are awarded through a bidding structure, with relative domicile seniority the sole determining factor. Finally, the order of "involuntary transfers," *i.e.*, those transfers occasioned by a surplus of flight attendants in a domicile in relation to the lines of flying manned by that base, are also determined by relative seniority within the domicile, again in inverse order with the least senior attendants being transferred first.

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[15] "Jumpseats" or designated vacant spots on United's aircraft which may be used by flight attendants at no charge, also are awarded on the basis of relative system-wide seniority. The use of jumpseats is especially important to those flight attendants who "commute" to their bases. Although the vast majority of flight attendants live where they are domiciled, United does not require them to do so.

As the significance of seniority has been described, the impact of reinstatement as a remedy can be appreciated. Whether the claimants were to be reinstated immediately or as openings are available, the impact of that remedy on the seniority status of the current work force remains the same. The claimant class potentially is equal in size from 13 per cent to 20 per cent of the current work force.[16] If reinstated with their original seniority dates,

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[16] Considerable controversy has been generated by the parties' attempt to predict the actual number of class members who would actually return to the work force if offered reinstatement with full seniority. From the outset all of the participants have realized the necessity of adopting some figure as a "benchmark" in order to lend content to the reinstatement hearing. All of the parties also acknowledged that any precise prediction was impossible under the circumstances. Accordingly, at a pretrial conference on September 8, 1980. AFA, United and McDonald agreed to employ an estimate of 1400 potential returnees for purposes of trial. *See* Tr. 9/8/80 PTC at 38-39. That agreement was confirmed at a subsequent pretrial conference on February 18, 1981. *See* Tr. 2/18/81 PTC at 51. As the hearing approached, however, the consensus seemed to dissipate and by trial all three parties had different estimates. United presented its case assuming 1480 claimants returning to the work force. The union's case assumed both 1400 and 1700 returnees and McDonald's evidence was premised on a figure of 1069.

Plaintiff's estimate, first raised on the eve of trial, is based on a number of untested assumptions. McDonald started with a class of 1700 to 1715 members. During discovery a random sample of 150 class members was selected for more detailed surveying. When 21 of the 150 failed to respond to the random sampling, that percentage was assumed to be uninterested in reinstatement. A similar discounting was applied when 9 of the 129 random claimants failed to respond to a followup reinstatement questionnaire. Finally, the resulting figure was discounted by 10% to reflect the experience in the *American Airlines* litigation, *supra*, where a similar percentage of entitlees declined reinstatement.

Perhaps McDonald's assumptions regarding the potential interest in reinstatement are correct, but if any one assumption is off, the number of potential returnees increases to a range of 1306 to 1657. The problem, of course, is that not only are these assumptions untested, they are untestable. On the other hand, United's

the median seniority of the claimants, July 1965, would exceed that of 88 per cent of the current flight attendants. More than two-thirds of the current flight attendants would have less seniority than the least-senior entitlee. Thus, taking a general view, the reinstatement of the McDonald class will substantially alter the absolute and relative seniority composition of United's current flight attendant complement. Indeed, the size and seniority of the claimant group relative to the incumbent work force is without precedent in any reported Title VII litigation.

B. *The Specific Impact of Reinstatement*

All that has been stated to this point is merely a prelude to the task facing this court—to identify the specific impact of reinstatement and to determine if it is "unusually adverse." The structure of the flight attendant position and the operation of the seniority system dictate that the impact of reinstatement takes many shapes and forms. The potential consequences range in severity from outright furloughs and firings to virtually de minimus reductions in the range of scheduling preferences for the most-senior United flight attendants. The court's findings

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and AFA's attempt to employ a potential returning estimate 1700 seems unduly high. It assumes that virtually all claimants have a desire and will retain their desire for reinstatement throughout the considerable length of these proceedings and despite the fact that some have, up to this point, demonstrated no interest in the remedy. Morever, although the experience in the *American Airlines* case is not controlling here, it cannot be simply ignored.

In these circumstances the court is once again persuaded that the original consensus estimate of 1400 potential reinstatements should be used at the benchmark in this instance. Since all parties were on notice to prepare for the hearing on that assumption, the use of the figure eliminates any possible basis for claiming surprise and seems eminently fair. It also appears wise given that the competing estimates are subject to the considerable uncertainties outlined above.

of fact as to the specific consequences of reinstatement are set forth below.

1. *The Possibility of Furloughs and Firings*

At present United Air Lines has a surplus of flight attendants. Since 1979 it has not hired a single additional flight attendant, but rather has been forced to furlough 1530 employees.[17] If 1400 claimants are immediately added to United's current complement of attendants there would not be a position for all. Additional furloughs would be inevitable, and given the projected seniority of the class members, 1400 current jobholders would face layoffs. In terms of seniority, all flight attendants with seniority dates back through March 7, 1977, would be furloughed. AFA Ex 12-A.

If the numerical impact of immediate reinstatement is readily apparent, the consequences in "human" terms are no less so to the court. The immediacy of that impact was driven home by the testimony of individual flight attendants at the hearing. For instance, Barbara Vauls, a flight attendant based at the Cleveland domicile, originally was hired by the airline to work in its food services division at the Cleveland airport in 1975. When the Cleveland domicile was opened in 1977 she immediately transferred to a flight attendant position on March 21 of that year. Vauls now has accrued over four years' seniority as a flight attendant, making her the 257th most senior flight attendant at the domicile. That ranking is high enough to have enabled her to escape reserve duty for the past three years. Vauls has been divorced since she began working at United. She supports herself and, with the assistance of her former spouse, helps put her daughter through college. Vauls received an award from United as "Flight Attendant of the Year" for 1980. If all 1400 claimants were immediately reinstated, given her current relative

[17] *But see, supra* at n.16.

system-wide seniority, Barbara Vauls would be furloughed or, as she put it, "after six years of service, dedicated service, I go to the street." Tr. 490.[18]

The consequences faced by Vauls, as well as those other current employees subject to furlough, are not benign. Besides the obvious loss of income occasioned by furlough, the furloughees will be forced to search for new employment in an unpromising job market. Moreover, if and when these flight attendants are recalled,[19] they will have lost even more. Under the current collective bargaining agreement, while the furloughees' relative seniority remains undiminished, their absolute seniority ceases to accrue. Accordingly, upon recall, it will take these attendants longer to rise in United's compensation categories as a result of their layoff.

McDonald has attempted to cushion the impact of reinstatement, particularly as it results in furloughing, through her proposal for reinstatement only as openings arise. Of course, by its very design, the openings proposal would completely short-circuit the necessity of fur-

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[18] Obviously, given her attributes and circumstances, the case of Barbara Vauls is extraordinarily sympathetic, so much so that it is almost as if she was ordered up from "central casting" for the hearing. While the court is not unmindful of the fact that United and AFA have, through careful selection of witnesses, placed their best foot forward, the distinctions between Vauls and a flight attendant of less seniority, skill or dedication, who face furlough, are differences only in degree, not in substance.

[19] In addition to the potential furloughs, certain least-senior flight attendants face the real prospect of a total loss of their positions. Under the provisions of the flight attendants' collective bargaining agreement, furloughed flight attendants retain their seniority rights for a five-year term. After that time, they are removed from the seniority list and have no greater employment rights than new hires. When and if 1400 additional furloughees are added to the 1530 now laid off, the total complement of furloughees exceeds United's expectations of new hires over the immediate five-year period, compounding the possibility of furloughs to a possibility of complete terminations.

loughs were it feasible. However, as discussed above, the chances of timely reinstating 1400 claimants through the creation of available spaces in the work force are quite slim. Realistically, therefore, McDonald's proposal would diminish the sheer number of layoffs, but not completely eliminate them. Assuming an openings plan were adopted by the court, the results would only be different in degree, not in kind, from those described above.

2. *The Potential for Involuntary Transfers*

For many of the flight attendants not subject to furlough upon the immediate reinstatement of 1400 claimants, the potential impact of that remedy would be nearly as drastic. Under United's domicile system the claimants could not simply be reintegrated into a single unit of the work force, but instead must be reinstated into eleven discrete systems throughout the country. Because each domicile is of a finite size, determined on the basis of United's route structure and the lines of flying manned by the base's attendants, the return of 1400 claimants would create surpluses of flight attendants at many of the domiciles. These surpluses (referred to as "trapped surpluses" at the hearing) could be alleviated by the involuntary transfer of incumbent workers to "less senior" domiciles.

As each of the domiciles vary in seniority (*i.e.*, some domiciles are composed of flight attendants with greater average seniority than others, presumably because flight attendants find those cities more attractive places to reside), the extent of involuntary transfers caused by reinstatement varies with each domicile. In some domiciles the consequences are dramatic. For example, United's Seattle domicile is one of the most senior in its system with a current population of 421 attendants. Assuming the claimants were reinstated to the domicile nearest to their current residence, based on the random sample of class members, approximately 148 class members would

return to the Seattle (domestic) domicile. As that base is manned by relatively senior flight attendants, the return of the claimants would cause only one flight attendant to be furloughed. However, a surplus of 147 people, or 35 per cent of the current domicile population, would result, all of whom would be subject to transfer by United to less senior domiciles such as Chicago or Cleveland, where vacancies would exist due to the furloughing of the least senior employees in the system. AFA Ex. 13-A Appendix A. In terms of seniority, the result is even more striking: all flight attendants with dates of hire subsequent to September 30, 1969 would face the possibility of forced transfer. AFA Ex. 13-A.

If the Miami domicile is used as the example in lieu of Seattle, the results reach absurd proportions. Miami is now a senior but relatively small domicile in the United system. It is also, based on the results of the random sample, the closest domicile to the residence of 143 claimants. Again, given the seniority of the current Miami complement, reinstatement would not result in any furloughs but in the involuntary transfer of 143 attendants —76 per cent of the domicile—including all those hires after February 28, 1966. AFA Ex. 13-A. Not even some of the claimants, who if reinstated with their original seniority dates, would have accrued enough seniority to avoid being transferred out of the domicile. AFA Ex. 13-A.

A flight attendant's domicile is of vital concern to his or her daily work life. The vast majority of the incumbents live (and in many cases with their families) in their domiciles. Virtually all have established ties to these communities, and some have even built second careers there. Tr. 1106. Forced transfer would subject many attendants to the unenviable choice of commuting from their homes to a distant domicile[20] or moving to the new

[20] The practical consequences of commuting can be quite harsh. Although United permits its attendants to commute it makes no

base. For those attendants unwilling or unable because of familial obligations to make that choice, the alternative

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special allowances for those who choose to do so. Several flight attendants testified that commuting involves a substantial sacrifice of free time. All attendants are required to report to work as scheduled. "No-shows" or tardiness subject all flight attendants to discipline, and ultimately, to discharge. Ensuring that these time commitments are met often requires commuters to arrive at their domiciles well before their scheduled flights. Depending upon the timing of their flights, certain attendants may be forced to spend additional time away from home at both ends of their trips. Those extended returns either require a second residence, or the expense of hotel accommodations in a second city.

Terry Patrick, a Denver-based flight attendant who formerly commuted from his home in Colorado to the Chicago domicile, recalled at trial:

> I usually went in the night before I was to fly out, whether it would be a reserve month or a line month. I had to stay in a hotel sometimes. Sometimes I stayed in the "stew" lounge. I would get into Chicago at 1 o'clock in the morning, I believe, and I would have trips leaving at 5 o'clock . . . that same morning. So I would just stay there for four hours. . . . I would sometimes not get back into Chicago in time to take a flight back to Denver. So I would have to stay an extra night in Chicago. . . . I would sometimes spend five days to fill [a] three-day trip.

Tr. 1118-19. *Also* Tr. 706.

Travel between cities also may involve considerable expense. If available, flight attendants may use "jumpseats" on United aircraft at no cost to the attendant. These spots, however, are limited and are awarded strictly on the basis of seniority without regard for any specific reason for which the seat is needed. If jumpseats are unavailable (an increasingly likely prospect if there are widespread transfers, and thus, many flight attendants competing for United's limited space, Tr. 1089), a commuter has several options. The best of these is to use a pass on a United flight (only ten-year attendants have unlimited passes). However, reservations cannot be made when passes are used, and available seats, if any, are again awarded on the basis of seniority. Tr. 705-10. If there are no United flights between an attendant's residence and his or her domicile, a flight attendant may commute on certain other airlines on a quarter-fare basis. Again, however, these spots cannot be

is to quit and find another job. Tr. 436, 705, 1079-80.[21]

Again, were McDonald's "openings" proposal a realistic alternative to immediate reinstatement, the impact of reinstatement in terms of involuntary transfers would be vitiated. But the doubts about the feasibility of promptly reinstating the claimants as openings occur are heightened rather than reduced when the consequences of transfers are considered. To the extent that attrition rates vary with length of service, attrition being greater among the less senior workers, some class members desiring to reenter the more senior domiciles may face inordinately long waits to have this preference fulfilled. Of course, there exists the possibility of reinstating the claimants in those domiciles where vacancies exist only due to furloughing. That alternative, however, merely shifts the "Hobson's choice" of relocating or refusing to accept reinstatement to the claimants. The court doubts whether the class members would even accept reinstatement on

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reserved in advance and are awarded on a space-available basis. In peak travel periods, therefore, the commuter faces the prospect of either waiting at the airport for an uncertain space, reserving a seat on a United flight at half fare, or flying full fare on another airline. Tr. 708. And, this option must be faced (and the expenses incurred) each time an attendant is scheduled for duty.

[21] For some flight attendants resignation is a very real possibility. For example, Julie Kaseguma, a Seattle-based attendant hired in January 1972 would be forced to transfer to another less senior domicile. Ms. Kaseguma transferred to Seattle in 1975 because her husband, an attorney, practiced law in that city. Ms. Kaseguma indicated that she could neither move to another city, nor could she afford to commute from a distant base to Seattle. Tr. 436-440. Those flight attendants who are able to change residences still face substantial hardships. Lucille Solana, a Miami flight attendant subject to forced transfer upon the return of 1400 claimants, testified that she would be forced to sell her home in Miami and purchase one in another city at a considerably higher cost. Tr. 1089.

those terms, and McDonald has not expressed a willingness to adopt this alternative.

Rather, plaintiff's position seems to be that transfers are a fact of life at United, a prospect not beyond the expectations of the current work force. That claim, however, simply is contrary to the facts. In the entire time since the claimants were forced to leave the airline, United never has involuntarily transferred its flight attendants on more than a short-term basis until this summer when United was forced to transfer 25 flight attendants involuntarily from the Miami domicile to Chicago, due to a reduction in flights to and from that city. Tr. 705, 718.

3. *"Demotions" to Reserves*

The possibilities of large scale furloughs and involuntary transfers are the most far-reaching consequences of reinstatement with seniority. Were the court convinced that these outcomes could be avoided by the adoption of planned reinstatements as available spaces occur, determining that the impact of that remedy would be "unusually adverse" would be somewhat more difficult. The other effects of reinstatement concern changes in the content of the current flight attendants' jobs less extreme than those discussed above. Among these other effects certainly the most troubling is the prospect that many senior flight attendants now serving as lineholders would be forced to return to reserve status.

The distinction between lineholders and reserve is fundamental. Whereas the former fly predetermined fixed monthly schedules, the latter can only bid for days off. On those days which they work, their lines of flying are determined by the airline, at its option and according to its needs. The practical effect of the system, in terms of scheduling, is that a reserve flight attendant does not know ahead of time there she will be on those days she is scheduled for duty, or whether she will return that

evening.[22] Moreover, those on ready reserve must be available for immediate call-ups to flights on their days off. Much of the individual's time is spent simply waiting for United to telephone them with their assignment.

There are important economic distinctions between lineholders and reserves. A lineholder can earn a relatively consistent income. More importantly, by bidding certain fixed schedules a lineholder can maximize her earnings by bidding schedules where she earns premium pay for extra flight hours or by holding a "first position" on board an aircraft. Still further, lineholders have increased opportunities to increase their income by picking up trips during their days off. The ability to bid and hold premium line positions might enable an individual to increase her income by as much as $2,500 per year. Tr. 713-717.

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[22] Almost every flight attendant who testified at the hearing remarked on the difficulty and undesirability of serving reserve. Illustrative of this testimony is the colloquy between Martha Petrie, a class member who again is working as a United flight attendant, and plaintiff's counsel.

Q [Plaintiff's counsel] I take it that you are content to remain on reserve?
A [Ms. Petrie] Am I content?
Q Yes.
A No.
Q Why is that?
A Why is that?
Q Yes.
A If you were a flight attendant, you would know.
Q Well, I am not a flight attendant, so why don't you explain [it] to me.

A Well, on reserve I have no choice of my trips or my hours or days. I may have a check-in at 4 o'clock in the morning; get in at 3 o'clock in the morning. I do know my days off. I have no control or I can't pick up trips if I want to make extra money. I can't bid a trip, because I want a hot meal expense. I can't do that. I can't predict my life as such. I can't really make plans.

Tr. 1741-18.

Given the undesirability of reserve duty, it is not surprising that flight attendants seldom opt for this status,[23] and concommitantly have as their goal the ability to get off reserve. According to the union the main demand of junior flight attendants over the years has been to be relieved of this condition. Tr. 752. And, although efforts have been made to improve their lot, more than one flight attendant witness likened reserved duty to "serving time." Tr. 1109.

Reinstatement of 1400 flight attendants with full seniority will occasion a wholesale displacement of thousands of current lineholders to reserve status. United's current reserve systems provides for "straight" reserves, who serve reserve every month, and "rotating" reserves, who serve alternating months. All flight attendants hired after October 1, 1977 must remain on straight reserve status until they have enough relative seniority in their domicile to become a lineholder. The most senior 25 per cent of each domicile are exempt from reserve duty. Assuming immediate reinstatement, since the impact of that remedy would cause the furlough of the post-1977 hires, for every junior flight attendant serving on reserve who is laid off, two more senior attendants would move to reserve, albeit on a rotating basis. According to the union's calculations, a total of 2802 flight attendants—or 32 per cent of the current work force—who are not now serving reserve would be called on to so serve on a relatively constant basis. AFA Ex. 15-B. (Appendix B).

As with transfers, the specific extent of any demotion to reserve status will vary according to domicile. Obviously, the more senior the domicile the longer a flight attendant must wait to get off reserve. Thus, in Seattle (domestic) the most senior flight attendant now subject

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[23] A witness, Rachel Woodings, a very senior flight attendant based in Washington, D.C. testified that the most senior third flight attendants never bid reserve, and the mid-senior third do so only infrequently, primarily to extend their vacation periods.

to reserve has a date of hire of February 17, 1970. In Chicago, a relatively junior domicile, reserve duty extends to those incumbents hired after February 20, 1978.[24] With the introduction of 1400 claimants into the system, according to their present closest domiciles, reserve duty at Seattle would include 134 additional flight attendants, or all those hired subsequent to November 1, 1967. At Chicago an additional 934 flight attendants with seniority as great as May 22, 1978 would be forced to fly reserve. AFA Ex. 15-A (Appendix C).

The adoption of McDonald's timetable for reinstatement cushions the impact in terms of reserve slightly, but does not come close to eliminating it. To the extent spaces are created by attrition of lineholders, reinstatement would not create a demand for additional reserves. More likely, that attrition will come from the current reserves.

McDonald's response to all this is twofold. First, she argues, citing the frequent transfers of flight attendants from junior to senior domiciles and thus, for example, from lineholder in Cleveland to reserve in San Francisco, that reserve duty is not so undesirable. However, the conclusion to be drawn from the transfer activity is more limited. Flight attendants regard the choice of domicile as more important than the distinction between lineholder and reserve. That evidence does not diminish the undesirability of the position.[25]

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[24] Chicago is so "junior" a domicile in the United system that even those junior flight attendants who would be forced to fly straight reserves in senior domiciles, such as Seattle, San Francisco or Honolulu, can hold lines at O'Hare.

[25] McDonald's suggestion that reserve cannot be regarded as so unmanageable because few reserves quit their jobs, McDonald Post-Trial Br. at 45, is also unconvincing. Present reserves have a strong incentive to stay on the job because, up to this point, they could reasonably expect that eventually they would move off reserve.

Plaintiff's second point is somewhat more convincing. She argues that the current work force has a continued expectation of reserve well into their careers.[26] McDonald Ex. 20. In addition, McDonald points out that the incumbents have no vested interest in getting off reserve since they now can be "bumped" back into reserve duty by a transfer into a domicile of a more senior flight attendant currently with the airline. McDonald thus concludes that the displacement created by reinstatement is no different from the current experiences of the incumbent work force.

At most, however, McDonald has succeeded in demonstrating that the consequences of extended reserve duty caused by reinstatement differ only in degree from the current experience. But even that is a substantial change. That from time to time relatively senior flight attendants may be reduced to reserve is not nearly the same as the reduction created by the addition of 1400 hires either at once or over time, all in the top one-third of the seniority list. While current flight attendants must expect to fly reserve well into their careers in some instances, their experience has been that if they stay on long enough they will continue to move up in seniority and move off reserve. Reinstatement would not only reverse that trend, it would do so to an unprecedented extent.

This is but one result of the stagnation of the seniority list, but it is a significant result. Whether the claimants are reinstated at once or over time they will slot into an

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[26] The fact that many flight attendants in certain senior domiciles fly reserve for a significant number of years may prove too much. First, as noted above, the past experience at United has been that the longer attendants stay with the airline the less reserve duty they must endure. For example, the maximum seniority of flight attendants serving reserve in Los Angeles reached back to 1969 hires during the first six months of 1979, but not since. McDonald Ex. 20. Most domiciles reflect similar experiences. For those that do not, *e.g.*, Cleveland, this may reflect a shrinking of the domicile because of United's current economic cutbacks.

existing seniority list. All of those below them, a great majority of the work force, must anticipate a decreased relative seniority extending over a significant period of their working lives. That is the antithesis of the seniority premise basic to the collective agreement, a premise that increased service will progressively result in increased benefits and increased rights. The diminution of expectations occasioned by seniority stagnation cannot be dismissed nor should it be underestimated.

Defendants have sought to make much of the impact of reinstatement on the attitude of the incumbent work force and on subsequent collective bargaining relationships. This court does not consider those matters germane to the issue before the court. Were it otherwise, any prejudices of those presently employed would be relevant to the remedy to be accorded to the victims of discrimination, and that obviously is not so. The intensity of feeling respecting long continued reserve status is germane, however, as it is some indication of the adverse impact of a stagnant seniority list. Clearly, junior flight attendants regard the prospect of long continued reserve status as a sentence to peonage massively affecting their lives and careers.

4. *The Impact on Lineholder Schedules*

The gravest consequences of reinstatement would be experienced by those flight attendants subject to furlough, transfer or reserve. Even among those most senior flight attendants, however, some impact will be experienced, primarily in terms of the diminished attractiveness of their schedules. Much of the hearing was devoted to the presentation of competing analyses of the impact of reinstatement on flight attendant scheduling. The most persuasive methodology for analyzing flight attendant bidding patterns was that suggested by plaintiff's expert, Dr. Hoffman. The most persuasive conclusions to be drawn from that analysis, however, are those suggested by the AFA.

Hoffman initially divided each of the domiciles in thirds, based on seniority (*i.e.*, most senior, mid-senior and least senior). On the basis of his analysis of the first bids submitted by the attendants in four domiciles (on the assumption that this was their top preference) and on the basis of a study of the bids actually awarded, Dr. Hoffman discovered a considerable heterogeneity among flight attendant preferences.[27] Tr. 1494. His analysis drew a distinction among the types of "trips" or sub-markets available to the flight attendants. Hoffman divided the range of options into "bulk lines," [28] one-day trips or "turnarounds," [29] three-day trips, two two-day trips and one one-day and one two-day trips. His analysis of the bids uncovered what he described as a "stacking" effect—the most senior and mid-senior attendants apportioned their bids among the different sub-markets. On the basis of the actual bid awards Dr. Hoffman determined that a substantial percentage of both the mid-senior and most senior groups were awarded a line within their desired sub-market. In short, his conclusion was that, by and large, the sub-markets are large enough, or have a sufficient "cushion," so that a flight attendant who bids a market has a substantial chance of obtaining a

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[27] Dr. Hoffman's finding of heterogeneity in line awards and bidding casts considerable doubt on United's analysis of the effect of reinstatement on line awards. United, in its presentation, attempted to "rebid" its Seattle domicile assuming reinstatement. United Ex. 20. The premise of that analysis was that bidding is a "lock-step" or "domino" process, in which if someone is added, she will take the bid of the person immediately below. However, if United's lock-step assumption were correct, one would expect a homogeneity of crew compositions. This was not the case. *See e.g.*, McDonald Ex. 33, Tbl. 21A-29A, 22B-29B.

[28] A "bulk line" is a favorable schedule in which a flight attendant does all her flying in two weeks (two three-day trips each week) and is off for the remaining 16-17 days in that month. Tr. 893-94.

[29] A "turnaround" is a one-day round trip ranging from five to eight hours. "High-time" turnarounds (*i.e.*, 8 hours) are regarded generally as very desirable trips. Tr. 894.

line in that market. Hoffman estimated that this cushion was large enough (50 per cent, Tr. 1533) so that upon reinstatement only a few flight attendants at the margin would be displaced from their preferred sub-market. The rest could still hold an acceptable bid through considerable diminution in seniority. (McDonald Ex. 33, Tables 21-46).

Dr. Hoffman's analysis is compelling until it is considered that there also is considerable heterogeneity among the trips in each sub-market. Quite simply, there are "good" three-day trips and "bad" three-day trips, and the same holds for each sub-market. Further analysis of bid awards reveals that virtually all of the preferable trips in any sub-market are dominated by the most senior flight attendants. For example, an analysis of line awards in among the most senior and mid-senior groups in Chicago reveals that 100 per cent of three-day trips, with weekends off, were flown by the most senior group. That group also flew 96 per cent of the most desirable (*i.e.*, "high time") turnaround trips, 100 per cent of the bulk lines, 95 per cent of the two two-day trips with non-stop flights, and 71 per cent of the two two-day trips other than non-stops, but with weekends off. In short, the evidence showed that the mid-senior group dominated only those sub-markets that the most senior groups did not want to fly. The least-senior group was awarded those lines left after the others expressed their preferences. AFA Ex. 29-34.

The impact of reinstatement on scheduling becomes apparent when it is considered that upon the return of 1400 claimants, 44 per cent of those attendants now in the "most senior" classification would drop to "mid-senior"; thirty-three per cent of those now in the "mid-senior" group would become among those "least senior" and subject to those lines rejected not only by the top third but by the mid-senior bidders as well. Accordingly, this court finds that the present schedules of the flight attendants,

although not subject to the "domino" effect suggested by United, would still be adversely affected. The insertion of 1400 class members at the top of the list would force many, if not all, lineholders below them in seniority to fly lines of diminished desirability.

In contrast, however, to the consequences of furlough, transfer and reserve, displacement in schedules is not the type of impact that can be considered "unusually adverse." Were this the only impact of reinstatement, that remedy could not be equitably denied. The diminished desirability of lines of flying appears to be the type of sharing of the remedial burden in Title VII cases that was demanded by the Supreme Court in *Franks*.

5. *The Economic Impact of Reinstatement on United*

Like any other employer who has engaged in unlawful employment discrimination, United may expect to suffer certain economic consequences. In the usual Title VII action those consequences only derivatively affect the employer's work force, and as such these economic consequences are not normally a matter of deep concern to the incumbents. There comes a point, however, where the economic impact is so vast that as a matter of business realities the economic burden placed on the employer does immediately impact on its employees as well. Such is the case here. Although the court might otherwise be more sanguine about this prospect were the consequences suffered only by the adjudicated wrongdoer, the impact in terms of dollars and cents is of such great magnitude in this instance that it must also figure into a finding of unusual adverse impact.

Assuming the reinstatement of 1480 [30] claimants, the costs to United run into the millions of dollars. Susan

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[30] Because the only witnesses testifying to the economic impact on United were the airline's own employees, and because United used 1480 instead of 1400 returnees as its estimate, that number is, of necessity, employed here.

Schaffer, Vice-President of In-flight Services at United, testified that the immediate, non-recurring cost to United would exceed $10,000,000. The non-recurring costs include furlough pay for the 1480 who would be furloughed, Tr. 516-17, transfer costs associated with those flight attendants forced to transfer involuntarily, Tr. 517-19, and uniform costs for outfitting the returning claimants. Tr. 517. The dollar amounts for these costs, which are required to be borne by United under the current collective bargaining agreement, are $1,942,382, $4,960,000 and $1,092,595, respectively. United Ex. 21. In addition, pursuant to FAA regulations all incoming claimants would necessarily need to be retrained. That one-time cost would exceed $2,500,000. United Ex. 21.

The annual recurring costs of reinstatement to United are primarily those associated with the salaries of the returning class members. Assuming immediate reinstatement, the difference between the salaries of the 1480 claimants to be returned to the work force and those 1480 flight attendants who would be furloughed, is $11,402,388. While this cost differential would decrease over time as more junior attendants move up in compensation levels, the differential is based on the current union contract and does not consider what might be predictable salary increases in the wage ceilings which now exists at the airline. Tr. 523, 551. Other recurring costs associated with compensation include those for vacation pay in the amount of $4,735,248, pension costs of $4,102,000, and Social Security payments of $758,259. The total annual recurring cost to the airline would therefore be approximately $21,000,000. United Ex. 22.

The potential increase in United's costs, however, must be viewed in perspective. Many of the immediate non-recurring costs estimated by United can be wholly eliminated or substantially reduced if McDonald's timetable for reinstatement is adopted. To the extent that furloughs and involuntary transfers are avoided by timing

reinstatements as openings occur, the need for furlough pay and transfer compensation obviously is avoided. Also, United's costs of retraining and uniforms, while substantial in the first year, may ultimately be saved since the airline would no longer need to outfit and train 1400 other new hires sometime in the future.

On cross examination Ms. Schaffer acknowledged that the current budget of In-flight Services is approximately $300,000,000 annually, of which 90 per cent or $270,000,000 is for flight attendant wages. Tr. 605. Thus accepting United's estimate of 1480 returnees, the increased costs associated with reinstatement means less than a 10 per cent rise in gross flight attendant compensation. This must be contrasted with increases United voluntarily assumed in its two most recent round of contract negotiations. In April 1980 United agreed to a compensation increase of 23 per cent, with another 10 per cent increase in March 1981. AFA Ex. 18. The airline proposes to increase wages by another 10 per cent in 1982. Wertheimer Aff. of 10/1/81 at ¶ 7. Moreover, United agreed to these salary increases when it acknowledgingly faced the prospect of large scale reinstatements.

In review, the potential economic impact of reinstatement on United is of such magnitude so as to give cause for some concern both on the employer's and employees' behalf. In an increasingly competitive deregulated industry, there exists a real possibility that some fallout from the increased economic pressures may be felt by the incumbent employees. But, while the economic impact is large it is not unprecedented in the experience of the airline. As such, the increased costs associated with reinstatement do not constitute "unusual adverse impact."

6. *The Impact on Minority Hiring*

Canvassed above are those ares where reinstatement with seniority would have its primary impact. But it is not a definitive catalog of all those consequences. One of

the unfortunate ironies of this lawsuit is that those who might potentially suffer from any remedy awarded to the claimants are among the same classes toward which Title VII's remedial goals are targeted. Pursuant to a consent decree entered into by United in the case of *EEOC v. United Air Lines, Inc.*, No. 73 C 973 (N.D. Ill. 1976), *aff'd.* 560 F.2d 224 (7th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978), the airline has increased its hiring of minority flight attendants over the past five years. Since these hires have little seniority, the reinstatement contemplated here would have a disproportionate impact on that group. Specifically, if 1400 claimants were returned, the percentage of minorities among the current work force would drop from approximately 15 per cent to 10 per cent. United Ex. 25; Tr. 612-13. In addition, reinstatement would decrease United's ability to meet its future minority hiring goals as the need to hire new flight attendants would be substantially diminished.

V. *THE APPROPRIATE REMEDY*

This is a case which has been overtaken by events. Plaintiff, with some justification, objected to defendant's evidence of change in the employment patterns and expectations of women over the past fifteen years. Even without that evidence, however, the historical setting of this lawsuit cannot be ignored.

This case is, in a real sense, a reflection of massive social changes in the 1960s, and the difficulties in fashioning a remedy arise in large part from the subsequent impact of those changes. Title VII is both a result of and a contributor to those changes, much as the "no-marriage" rule flowed from pre-existing societal perceptions and influenced expectations.

It requires no expert testimony to establish that in the early 1960s continued employment by women after marriage was far less a normal expectation than it is today. It is surely beyond dispute that there then were, far

more than today, positions perceived as men's jobs, women's jobs or, indeed, single women's jobs. And corollaries to that expectation and that perception were that "women's jobs" were often more poorly paid, less attractive and more transitory than other comparable employment.

Prior to the middle sixties a flight attendant who married and did not wish to conceal that marriage left her employment. Undoubtedly this termination was often reluctant, dictated by the absence of choice. But clearly, also, that termination often was the consequence of individual perceptions of women in the work force—that upon marriage one left the work force to care for a family—and of individual perceptions, reinforced by the "no-marriage" rule, that employment as a flight attendant was a finite experience, not a career. The passage of the Civil Rights Act of 1964 coincided with emerging changes in those perceptions, and undoubtedly reinforced them. It is not without significance, however, that the initial attempts in the middle sixties to abrogate the "no-marriage" rule relied upon union grievance procedures, not Title VII, and that such grievances only then were first seriously pursued despite a long collective bargaining history.[21]

Until 1965 married flight attendants left airline service in the context of an established practice not subject to serious challenge. Since 1968 marriage has been no bar to continued employment. The plaintiff class are those forced to leave United Air Lines during that transitional period. Other airlines long ago bought their peace, or were required to do so, with those who most tenaciously pursued their rights. The great majority of the flight

[21] The court gained the impression at the hearing, perhaps unfairly, that for many years the flight attendants even in the bargaining relationship did not have powerful representation, that they were a species of woman's auxiliary of the Airline Pilots Association.

attendants forced to leave other airlines suffered the same fate as their predecessors. Only at United was there, ultimately, a class encompassing virtually all those adversely affected during the transitional period in which an industry recognized, or was forced to recognize, both broad social and legal changes.

There have since been profound consequences because of those social and legal changes and because of the passage of time.

As discussed earlier, the claimants left a marginally attractive position and seek to return to one providing far better compensation, working conditions and benefits even for entry-level employees. One reason for broad remedial relief, to eliminate discriminatory conduct and deter its repetition, is not applicable to the circumstances of this case. Reinstatement would in large measure severely impact married women who are presently career flight attendants, persons beneath the same sheltering umbrella of Title VII. And because the position has so favorably changed, those women have a strong and legitimate interest in protecting what they have.

The passage of time compounds the complexities of remedial relief and has, albeit indirectly, an effect upon the inequities of reinstatement. One need not be an expert to recognize that women who left United 13 to 16 years ago because of marriage, and then decided to have children, are likely to have children now of an age which permits outside employment without undue personal dislocations. Senior seniority would allow claimants great flexibility in determining when and for how long they will fly and also provides compensation and benefits considerably superior to that of entry-level employees. That combination is a powerful stimulus to a claimant's good faith recollection of her commitment to a flight attendant's career. While those considerations are more properly relevant to entitlement issues, this court cannot wholly ignore the reality that, for many, reinstatement

now has an attraction it might well not have had a decade ago.

Finally, in the short space of two years, economic conditions have materially worsened. Instead of an expanding work force in which the claimants could be integrated without unusual adverse impact, claimants seek reinstatement in a climate of progressively curtailed employment. Nothing suggests that a return to a growth pattern is likely in the near future.

To fashion a fair reinstatement decree in this instance, it is necessary to return to the beginning. As noted above, this lawsuit is unique. The sheer size of the class seeking reinstatement and the length of time they have waited for relief is unprecedented. Alternatively, the adverse impact or reinstatement of 1400 claimants also is of a magnitude without precedent. The consequences in terms of furloughs, forced transfers, displacements to reserve and diminution of job-related rights are of such grave proportions that to ignore them would be a clear abuse of the court's equitable discretion. To the extent that relief awarded under Title VII may result in an "unusual adverse impact" in any circumstances, it does so here. As a result, immediate reinstatement of 1400 claimants with full seniority is simply not an acceptable alternative. Delaying the return of the 1400 to the work force as openings occur helps to resolve the equitable dilemma only minimally. Even if reinstatement could be accomplished promptly under such a scheme, the possibilities of involuntary transfers, displacements to reserve and the effective diminution of seniority rights remain. The impact would still be unduly adverse.

Clearly, a remedy must be forged which recognizes the class member's right to reinstatement while succeeding, insofar as possible, in protecting the interests of the current complement of flight attendants. As the impact of reinstatement largely was shaped by United's seniority system, not surprisingly the most equitable plan for re-

instatement can be fashioned by tailoring the decree to the operation of that system.

The court will order that all those members of the McDonald class (those who succeed in demonstrating their entitlement to reinstatement at a subsequent individualized hearing) are to be reinstated. For purposes of reinstatement and continued employment as a flight attendant at United, however, the seniority rights of the returnees will be modified. Upon reinstatement the class members will be entitled to "company" seniority as of their original dates of hire for all purposes (*e.g.*, vacation days, passes, etc.) for which that measure of seniority is employed. The class members are also entitled to the measure of "classification" seniority from their original dates of hire for the purpose of compensation only. For all other purposes, including voluntary and involuntary transfers, bidding, furloughs and jumpseat availability, the McDonald claimants' seniority will be adjusted to reflect the actual amount of seniority accrued during their tenure as flight attendants before they were forced to terminate under the no-marriage rule.[22]

To this end United will be directed to merge the names of claimants, as their entitlement is determined, into its system seniority list. The practical effect will be to treat the claimants as if they were currently furloughed employees, eligible for recall as their seniority permits. For some claimants who had significant tenure at United before their resignation, this will result in immediate reinstatement upon determination of entitlement because they will be more senior than all current furloughees. For others who worked only briefly at the airline before the no-marriage rule was abrogated, they will have to

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[22] For purposes of reserve duty, the returnees will be entitled to have their original dates of hire recognized by the union and United. Accordingly, upon reinstatement, the returnees will serve as "rotating" and not "straight" reserves.

wait, possibly for a considerable period, for reinstatement. Nevertheless, this system seems most fair.[33]

United's domicile structure requires still further detailing of the decree. Were reinstatement offered as vacancies exist without regard to domicile on a "take-it or leave-it" basis, the promise of reinstatement would largely become illusory. If forced transfers of incumbent flight attendants away from the city of their residence is unduly burdensome, it can be regarded as no less so for the entitlees. There is significant doubt as to the number of women who would accept reinstatement conditioned upon a move to another city after all these years, or conditioned upon the prospect of long-term commuting. Accordingly, upon a finding of their entitlement, the claimants will furnish the airline with a list of those domiciles in which they would find reinstatement acceptable. As those individuals become eligible for recall, they should be given the option of returning to the domicile in which space is available, or alternatively, waiting until a vacancy occurs in a more acceptable location.

Admittedly, the court's plan for reinstatement may be somewhat cumbersome. But, at times, the exercise of equitable discretion does not square well with the drafting of neatly packaged remedies. Equity often calls for flexibility and, at least in this instance, calls for a rather detailed decree.

As the claimants will return with only their actual accrued seniority for scheduling purposes, the number of

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[33] Specifically, the court finds that the denial of complete seniority in the context of reinstatement here is occasioned " 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination.' " *Franks*, 424 U.S. at 771, *quoting* Albermarle Paper v. Moody, 422 U.S. at 421.

attendants displaced to reserve[34] will be minimal. More importantly, for those incumbents who are displaced to reserve or affected for bidding purposes, these consequences cannot be considered unfair. The basis of displacement is that other flight attendants have served longer in that position than they. As such, the standard for determining employment benefits will remain the same as before reinstatement. Indeed, to the extent a current flight attendant is displaced, it would closely resemble the impact caused by United's liberal policy regarding transfers between domiciles. The "bumping" occasioned by reinstatement is of the same type now experienced by an incumbent when a more senior attendant transfers into her domicile.

At the same time, the remedy detailed herein would enable the claimants to return to their jobs with the most favorable package of employment benefits which does not otherwise cause an unduly adverse impact which would preclude reinstatement altogether. Concommitantly, the incumbents cannot be heard to complain about those benefits of super-seniority which are received by the claimants. The amount of vacation days will not diminish any of the incumbent's conditions of employment.[35] That more flight attendants will be eligible for unlimited pass privileges also has a de minimis impact on the current work force. All incumbents would receive the same allotment of passes. That there might be more competition over the use of pass privileges is not the type of consequence that can be considered unduly burdensome. Indeed, the

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[34] For example, in senior domiciles such as Seattle, Miami, San Francisco and Honolulu, all returning claimants would serve reserve; no current lineholders would be displaced. AFA Ex. 13-A.

[35] Indeed, in some respects, reinstatement will have a beneficial impact for the incumbents if the claimants are returned with full seniority for purposes of vacations. With increased time off to the claimants, an additional number of flights would be available to those flight attendants who bid "relief" lines, and move up from there.

only real impact of reinstatement on the current work force is only derivative, *i.e.*, that caused by the economic burden placed on the airline. But again, because some sharing of the burden of reinstatement is demanded by *Franks*, these consequences do not serve as a basis for denying relief.[36]

To the extent reinstatement will have a substantial impact, the brunt of that impact will be borne by those individuals currently on furlough status. In this instance, however, when the competing equities are weighed, the interests of the returning class members outweigh those of the current furloughees. These individuals have no vested rights to reemployment by United. To the extent they have rights at all, that right is to be recalled by United before the airline hires anyone "off the street." That right is premised on the fact that these furloughees have accrued more seniority than a potential hire. Insofar as a current furloughee is adversely affected by the remedy ordered here—in the form of a longer period of waiting for recall—the same dynamic is at work. Again the adverse affects of reinstatement come from the fact that the claimants have worked at United longer than the current furloughees.

Neither is the effect of reinstatement on the furloughees' expectations of employment unfair. Those flight attend-

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[36] Human nature being what it is, perhaps the most significant result of the remedy awarded here is the hue and cry it would occasion among the incumbents because the claimants, who have not served for twelve to fifteen years, would be paid more than they. This type of hostility to the decree is not a cognizable basis for denying verdict. As the Second Circuit observed in United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971):

> [I]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

446 F.2d at 663, *quoted with approval*, *Franks*, 424 U.S. at 775. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958).

ants now laid off know that they were hired in highly uncertain times. Obviously, the precariousness of their employment was driven home when they were furloughed. The uncertainty of recall was indicated to them at the time they left United, and reinforced in the context of this case. Indeed, they were informed by a letter to all flight attendants on January 29, 1980, from Susan Schaffer, Vice-President of In-flight Services, that this case was pending, involving a class of 2400 women, and that "there are likely to be some reinstatements." United Ex. 29. Under these circumstances, and given the length of the furlough in many individual cases, it reasonably can be expected that many of those on furlough have found other employment and would not be expected to return to the work force.[37] In the final analysis, therefore, the rights of a class of 1400 former flight attendants, who through no fault of their own have waited over ten years for reinstatement, cannot equitably be wholly sacrificed in favor of the indeterminate interests of the current furloughees.

Accordingly, it is ordered that those members of the McDonald class who successfully demonstrate their entitlement shall be reinstated as flight attendants at United Air Lines under the terms and conditions outlined here.

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[37] In the past, attrition rates among furloughees have ranged as high as 85% in 1971 and 16% in 1974 and both those furloughs were considerably shorter in duration than the present layoffs. The attrition rate for furloughs is likely to be higher here when the expectations of the current furloughees are examined, in light of the current volatility of the industry. Not only are they subject to recall without any guarantee that they will not be laid off again at some point in the future, they are being recalled for a job increasingly less desirable for those at the bottom of the seniority list. Given the current low attrition rates at United, the current furloughees are waiting to return to positions in which it is increasingly difficult to realize any rewards of seniority, *e.g.*, lineholder status, without serving long into their careers. The upward mobility in the system simply is not still present at United.

Counsel for the parties are directed to draft an order in conformity with the views stated herein.

/s/ James B. Moran
JAMES B. MORAN
Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 1157

CAROLE ANDERSON ROMASANTA, *et al.* and
LIANE BUIX MCDONALD, on her own
behalf and on behalf of others
similarly situated,
Plaintiffs,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant.

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

[Filed July 14, 1982]

ORDER

This court, having before it and having fully considered the issue of whether reinstatement should be an element of the remedy to be granted to those claimants who can establish that they are members of the class as defined in *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 359 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), and the terms and conditions of such reinstatement, rendered its decision on January 8, 1982. In accordance with that opinion, it is by this court this 12th day of July, 1982,

ORDERED, that all claimants who succeed in proving that they are members of the class, and who desire to be reinstated, are to be reinstated to the position of flight attendant with defendant United Air Lines, Inc., subject to the following conditions:

1. Upon reinstatement, class members will be entitled to company seniority from their original dates of hire with United for all purposes for which that measure of seniority is employed;

2. Upon reinstatement, class members will be entitled to classification seniority from their original dates of hire as United flight attendants for the purpose of compensation under the applicable collective bargaining agreement;

3. For all other terms and conditions of employment determined by classification seniority, including, but not necessarily limited to, those terms and conditions expressly set forth in the applicable collective bargaining agreement, class members upon reinstatement will be awarded that amount of classification seniority which reflects the period of time between their entry into the classification and their termination because of the no-marriage rules (less any period during which seniority would not accrue under the applicable collective bargaining agreement and plus or minus any periods reflecting any system-wide adjustments);

4. Those class members who were in active service with United on January 8, 1982 (or on furlough from such a position on that date) will have added to their non-compensation classification seniority determined by paragraph 3 a period of time reflecting the period of their active service to the extent such service was credited for flight attendant seniority purposes under the then effective collective bargaining agrement;

5. Upon determination that a claimant is entitled to reinstatement as a class member, she shall be placed on

United's system seniority list as if she were a currently furloughed employee eligible for recall as permitted by her classification seniority, measured in accordance with paragraph 3 of this order and subject to the terms and conditions of the applicable collective bargaining agreement. At that time, the reinstated class member will furnish United's Division of Inflight Services a list of those flight attendant domiciles to which she would find reinstatement acceptable. The class member shall also advise United of her current address;

6. As openings occur in United's system, class members eligible for recall by virtue of their place on the seniority list, shall be given the option of returning to a domicile where there is an opening or, alternatively, waiting until a vacancy occurs in a more acceptable location;

7. United shall provide notice of vacancies to class members on the seniority list who have identified domiciles where such vacancies exist as acceptable and who have a reasonable possibility of being recalled to fill the number of available vacancies. The notice shall include the location and number of such vacancies and shall constitute an offer for the class member to bid for recall at available domiciles in the order of preference of those she finds acceptable;

8. A class member who desires to bid to accept such an offer must by certified letter or telegram so notify United within twenty-one days of the date she receives the initial notification, indicating therein which domiciles she accepts and the order of preference among acceptable domiciles;

9. Within twenty-one days of her bid, United shall provide the class member a letter setting forth the domicile for which her bid is accepted, the mechanics of her recall and a statement of her non-compensation classification seniority. If the class member's bid for available domicile cannot be accepted, United will notify her of

that fact and she will be notified of the next openings at acceptable domiciles. Recall shall be in the order of non-compensation classification seniority at each available domicile among those who accept the offer;

10. The class member electing to return to service must return on the date specified by United in its letter notifying the class member of the acceptance of her bid for reinstatement as described in paragraph 9 of this order, unless good cause for a reasonable extension has been previously shown. Such date shall not be less than thirty days after the date when such letter is sent;

11. Any class member who is to be recalled to active service must be fully qualified to assume such service in accordance with United's regulations generally applicable to all flight attendants, including the successful completion of United's training program. Once recalled, if the class member will, by virtue of her classification seniority at the domicile to which she returns, be required to serve on reserve duty, such service will be as a rotating reserve, not as a straight reserve, as those terms are defined in the applicable collective bargaining agreement;

12. United shall provide plaintiffs' counsel with a current system-wide seniority list every six months when it is prepared by United's Inflight Services Division. Other reporting requirements shall be the subject of a further order;

13. Retaliation against class members being unlawful, both United and the Association of Flight Attendants recognize their obligations not to sanction, directly or indirectly, discriminatory conduct by their respective employees and members against class members.

This Order, implementing the Memorandum and Order of January 8, 1982, provides for less than full retroactive seniority upon reinstatement. For that reason, this court is of the opinion that the order involves a controlling question of law as to which there is substantial ground

for difference of opinion, and that an immediate appeal from the order may materially advance the termination of the litigation.

/s/ James B. Moran
JAMES B. MORAN
Judge
United States District Court

July 12, 1982.

Opinion by Judge Pell

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 21, 1983

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. FLOYD R. GIBSON, *Senior Circuit Judge**

Nos. 82-2647, 82-2660, 82-2661

CAROLE ANDERSON ROMASANTA, *et al.* and
LIANE BUIX MCDONALD, on her own behalf
and on behalf of all others,
Plaintiffs-Appellants-Cross-Appellees,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant-Appellee-Cross-Appellant,
ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 70-C-1157—James B. Moran, *Judge*

---

* Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 20, 1983

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. FLOYD R. GIBSON, *Senior Circuit Judge**

Nos. 82-2647, 82-2660, 82-2661

CAROLE ANDERSON ROMASANTA, *et al.* and
LIANE BUIX MCDONALD, etc.,
Plaintiffs-Appellants-Cross-Appellees,

vs.

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Defendant-Appellee-Cross-Appellant,
ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
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No. 70-C-1157—James B. Moran, *Judge*

---

* Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, is sitting by designation.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant and class representative Liane Buix McDonald, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 83-1180

Office - Supreme Court, U.S
FILED
FEB 21 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LIANE BUIX McDONALD,
on her own behalf and on behalf of
all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.
and
ASSOCIATION OF FLIGHT ATTENDANTS
and
JOYCE BARR,

Respondents.

BRIEF OF UNITED AIR LINES INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the district court properly exercised its equitable discretion, affirmed by the Seventh Circuit, in light of the principles of *United Air Lines Inc.* v. *Evans*, 431 U. S. 533 (1977), involving both a member of plaintiff class and the very seniority system at issue, as recognized in *International Brotherhood of Teamsters* v. *U.S.*, 431 U. S. 324 (1977) and in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), thereby depriving plaintiff class of any support for its claim, raised in the face of those principles by their petition for certiorari, that *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976) controls this case and mandates reinstatement with the maximum amount of complete retroactive seniority.

PARTIES TO THE PROCEEDINGS

(a) Carole Anderson Romasanta and eleven other named individuals were respectively the original named Plaintiff and subsequent Intervenors in a class suit filed May 15, 1970. They obtained relief by a final judgment entered on October 3, 1975.

Petitioner Liane Buix McDonald was a putative member of the *Romasanta* class but was excluded from the class by order entered December 6, 1972 because she had not protested the no-marriage rule of United Air Lines, Inc. ("United"). On October 21, 1975 McDonald petitioned to intervene in order to appeal from the final order of October 3, 1975, which reiterated the December 6, 1972 action excluding non-protestants from the class. She was ultimately held to have had the right so to intervene and appeal. *United Air Lines Inc.* v. *McDonald*, 432 U. S. 385 (1977). She was an Appellant-Cross-Appellee in the Court below.

(b) Respondent United Air Lines, Inc., is a Defendant. It was an Appellee-Cross-Appellant in the Court below.

(c) Respondent Association of Flight Attendants intervened in the District Court to represent the interests of incumbent United Air Lines flight attendants. It was an Appellee in the Court below.

(d) Joyce Barr, respondent and one member of the class, filed separate briefs, denominated as those of an intervenor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LIANE BUIX McDONALD,
on her own behalf and on behalf of
all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.
and
ASSOCIATION OF FLIGHT ATTENDANTS
and
JOYCE BARR,

Respondents.

BRIEF OF UNITED AIR LINES INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Air Lines, Inc.[1] ("United") opposes the petition for certiorari to the United States Court of Appeals for the Seventh Circuit filed by plaintiff class.

[1] United Air Lines, Inc. is a corporation, and its parent corporation is UAL Inc. with offices at 1200 Algonquin Road, Elk Grove, Illinois 60666.

THE OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals For The Seventh Circuit is published in 717 F. 2d 1140, and reprinted in the Appendix to the petition for certiorari (pp. 1a-39a). The Memorandum Opinion of the District Court, from which the interlocutory appeal here involved was taken, is published in 27 EPD ¶ 32,353 and reprinted in the Appendix to the petition for certiorari (pp. 40a-93a).

JURISDICTION

The Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit, filed by the plaintiff class under 28 U. S. C. § 1254(c) to review the Opinion and Judgment of September 21, 1983, was received by United on January 20, 1984, rehearing having been denied on October 20, 1983.

STATUTORY PROVISIONS

42 U. S. C. § 200e(5)(g) (in part):

> "...[T]he court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees with or without back pay ... or any other equitable relief as the court deems appropriate."

STATEMENT OF THE CASE

The Litigation Background

The life of this most venerable of Title VII[2] cases has hung by the thinnest of threads since August, 1966, when Mary Burke Sprogis filed a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC") protesting her discharge as a flight attendant because of United's no-marriage rule. A 2-1 decision of the Seventh Circuit in 1971, the reasoning of which was trenchantly dissented from by Judge (now Mr. Justice) Stevens and which has been expressly disapproved by other courts, was the first technical life support system supplied this litigation. Compare *Sprogis* v. *United Air Lines Inc.*, 444 F. 2d 1194, 1202 *et seq* (1971), *cert. den.* 404 U. S. 991 (1971), with *Stroud* v. *Delta Air Lines, Inc.*, 544 F. 2d 892, 894 (C. A. 5, 1977). United is the only major airline to have been held liable because of a no-marriage policy for stewardesses, which was virtually universal in the industry and which United abandoned long before the first adverse judicial adjudication thereon was rendered against United and very shortly after the EEOC had finally concluded (after some two years of indecision) that the no-marriage policy violated Title VII.

More than five years later the Seventh Circuit, again 2-1 over a vigorous dissent, permitted a much-delayed filing of a petition to intervene by Liane Buix McDonald to establish a class action after class certification had three years previously been denied by the District Court and after the claims of all those class members who had filed timely charges had been satisfied. *Romasanta* v. *United Air Lines, Inc.*, 537 F. 2d 915, 920 (C. A. 7, 1976). This was affirmed 5-3 by this Court (Mr. Justice Stevens taking no part). *United Air Lines Inc.* v. *McDonald*, 432 U. S. 385 (1977).

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[2] 42 U.S.C. § 2000e-5(b) confers jurisdiction of Title VII actions upon the United States district courts.

Subsequently, the class was certified as all United stewardesses who terminated because of the no-marriage rule between July 29, 1965 and November 7, 1968 (when the no-marriage rule was withdrawn), even though no present member of the class (including the named class representative) may have filed timely charges upon her termination. *McDonald* v. *United Air Lines Inc.*, 587 F. 2d 357, 361 n. 10, n. 12 (C. A. 7, 1978), *cert. den.*, 442 U. S. 934 (1979). There remained for decision the reinstatement and back pay remedies to be awarded the class as a whole and the many hundreds of claims by individuals who asserted that they were members of the class. The Seventh Circuit stated that claimants "must, as counsel for plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief." (587 (F. 2d 357, 360 n. 4.))

The class reinstatement remedy is the subject of the Seventh Circuit decision as to which the plaintiff class here seeks certiorari. The District Court has under advisement but has not yet ruled on the back pay relief to be awarded the class.

The many hundreds of individual entitlement hearings commenced in April, 1983, before several special masters and as of February 17, 1984 some 512 claims out of a potential total of almost 1800 have been heard.

The Factual Background.

The position of the present-day flight attendant has changed dramatically since the 1965—1968 time period of class membership here. "The claimants left a marginally attractive position and seek return to one providing far better compensation, working conditions and benefits even for entry-level employees." (App. 86a.) A flight attendant with top compensation ("non-competitive") seniority earns well over $35,000 a year. (The annual salary in the mid-sixties was $4,100 for more hours of actual working time.) A great part of achieving this "more lucrative, more permanent and generally

more desirable [job] than the [plaintiffs] were forced to leave" (App. 62a) was the result of the efforts of the more senior incumbent flight attendants and of a labor union of which none of the plaintiffs was even a member.

The devastating effect on incumbent flight attendants of granting the large plaintiff class seniority for reinstatement (competitive) purposes cumulative for the entire sixteen to nineteen years which have passed since the marriages of plaintiff class members and the termination of their employment at United is depicted in the thorough analysis made by the district court and affirmed by the Seventh Circuit. No more accurate and convincing statement of this aspect of the case could be made in this Brief, and the Court is therefore referred at this juncture to pages 60a-81a, 87a and pages 20a-30a of the Appendix to the petition for certiorari.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

1. The Evans Case Provides A Compelling Alternative Ground For Upholding The Decisions Below Denying Retroactive Seniority For Reinstatement (Competitive) Purposes.

After extensive hearings into the impact of granting the plaintiff class seniority as if they had been continuously employed by United as flight attendants for the past sixteen to nineteen years, the District Court, in a very detailed and comprehensive opinion, decided that, for reinstatement (competitive) purposes, the impact on United's incumbent work force was so unusually adverse as to call for denial of such complete retroactive seniority. The Seventh Circuit affirmed, holding that the District Court had properly

> "reconciled the language in *Franks* and *Teamsters* by applying the *Franks* presumption, requiring United and AFA to carry the burden of demonstrating 'unusual adverse impact', and relying on the factors enumerated in *Teamsters* as relevant to that showing. Absent any explicit statement in *Teamsters* that the standard enunciated in *Franks* was no longer viable, we believe the approach taken by the district court is correct and have followed the same mode of analysis on appeal" (App. 30a; 717 F. 2d, at 1156.)

In the light of the above, what the Seventh Circuit did not need to consider was the ground urged by United in support of the denial of retroactive seniority for reinstatement purposes, namely:

1. The *Evans* case (431 U. S. 553), in and of itself (431 U. S., at 458-9) and as interpreted in *Teamsters* (431 U. S., at 348, n. 30) and *Zipes* v. *Trans World Airlines, Inc.* 455 U. S. 385, 401-2, 401 n. 1), precludes the granting of any such full 'make-whole' equitable relief, because in *Evans* a member of the very plaintiffs' class involved here was denied retroactive

seniority after her re-hire by United for the reason that she—*like every present or potential member of the plaintiff class*—had not filed timely protest against her termination under the no-marriage rule.

2. In the *Evans* situation, this Court stated that "our decision in *Franks* v. *Bowman Transportation Co., supra,* does not control this case." (431 U. S., at 458-9) [The Seventh Circuit had reversed itself on rehearing in *Evans* because of the intervening decision in *Franks* v. *Bowman,* but this Court upheld the initial panel's decision that Evans' claim to retroactive seniority was time-barred and not aided by *Franks* v. *Bowman.*]

3. The *Evans* decision came down on the same day as *Teamsters,* and was referred to in footnote 30 of the *Teamsters* opinion (431 U. S., at 348) as broadly holding that

> "the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee."

4. In the *Zipes* case Mr. Justice Powell took that same position in his concurring opinion, joined in by the Chief Justice and Mr. Justice Rehnquist: Under the *Evans* case the equitable remedies available under *Franks* and *Teamsters* do not extend to those discriminatees who have not filed timely charges of discrimination. Therefore, *Evans* should have been but was "not discussed in the Court's [majority] opinion" in *Zipes,* which should have made clear "that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a bona fide seniority system protected by § 703(b). This was made clear in *United Airlines, Inc.* v. *Evans,* 431 U. S. 553, 559 . . ." (455 U. S., at 401-2.) Indeed,

> "In *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976), timely charges of discrimination had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they

> would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a district court should consider these equities in determining whether to award competitive-status seniority . . ." (455 U. S., 401, n. 1.)

The foregoing, rather conclusive argument against the position taken by the plaintiff class in their petition for certiorari—that *Franks* is an automatic rule of law mechanically requiring full retroactive competitive seniority—was expressly reserved by the Seventh Circuit:

> "United also relies on this argument as an alternative ground in support of the district court's judgment regarding competitive seniority. Because we have resolved that issue on the grounds set forth in the district court opinion, we will not consider United's alternative ground in that context." (App. 32a, n. 12)

The simple fact is that plaintiffs' class suit is a hollow shell, thinly disguising a group of persons hoping for a windfall on the ground that they have succeeded in establishing legal standing to sue as a class which is not technically barred by any jurisdictional time barrier. But because no present member of the class filed timely charges upon her termination (*McDonald* v. *United Air Lines Inc.*, 587 F. 2d 357, 381 n. 10, n. 12 (C. A. 7, 1978)), the class' substantive standing is of the most barren and inequitable nature. Plaintiffs' class brings no favorable equities into this case—only the bare legal right not to have been terminated in 1965-1968. That right is given ample remedy by reinstatement from furlough according to actual time served as a stewardess, as ordered below, and by the class back pay award which has yet to be entered.

2. The Class' Petition Misstates The Procedure And Rationale Adopted By The District Court, Including The Considerations Relevant To The So-called "Openings Proposal".

In its attempt to castigate the lower courts' well-reasoned decisions, the plaintiff class resorts to serious distortions which should not be considered by this Court. The district court, sitting in Equity, properly considered the impact of full reinstatement of 1100-1400 class members because all parties, including the plaintiff class (save Respondent Barr), concurred prior to the hearing on seniority that the matter should be considered on the basis that at least that number of the 1800 claimants would successfully seek to be reinstated with full seniority. The determination on this basis that less than full retroactive seniority should be granted cannot now be used to fault retroactively the procedure and rationale adopted by the district court. It was essential that a claimant's decision whether or not to seek reinstatement in addition to backpay be informed by fore-knowledge of the seniority to be awarded. If the court had deferred consideration of the reinstatement seniority issues, claimants would have been required to speculate on the results. The court with all parties' concurrence (save Respondent Barr's) accordingly decided to measure the remedy first. The class' disenchantment with the result does not suggest a need for Supreme Court review.

Moreover, the district court properly recognized the class' so-called "openings proposal" as a sham. The conditions imposed on the proposal, including the accrual of millions of dollars in front pay while class members awaited openings in the work force, deprived the plan of any mitigating force as to adverse impact. Faced with an obligation to pay both a waiting class member and a working incumbent for the same job, United would act rationally by exercising its contract rights to furlough incumbents in order to reinstate class members. These furloughs would not be "false vacancies", but ony the necessary economic result of plaintiffs' proposal. The ultimate effect

would be the same as immediate reinstatement of class members with the same resulting unusual adverse impact which the district court found unwarranted. The class' blizzard of epithets (Petition, pp. 16-17) does not change these economic realities. Neither do those charges support its petition.

CONCLUSION

Should this Court somehow feel that there is any merit to the petitioners' criticism of the thorough and exhaustive approach taken by both the district court and the Seventh Circuit in respect to seniority for reinstatement (competitive) purposes, then the alternative ground offered by *Evans* for supporting that decision below should independently suffice to demonstrate that the writ should not be granted.

Respectfully submitted,

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CLERK

No. 83-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LIANE BUIX McDONALD,
on her own behalf and on behalf
of all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

When the Courts below determined, based on a detailed evidentiary record, that an award of full retroactive seniority in a Title VII case would have caused unusual adverse impact of unprecedented dimension to incumbent employees, did such Courts abuse their discretion by granting all class members reinstatement with partial retroactive seniority for competitive purposes, full retroactive seniority for compensation and benefits, and other special relief?

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BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

A. The original underlying action, *Romasanta* v. *United Airlines, Inc.*, was directed at a "no-marriage" rule maintained by United Air Lines ("United") which previously had been eliminated and declared illegal under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* 2a-3a.[1] After class action status was denied and the claims of all individual plaintiffs settled or dismissed, Order, October 3, 1975, Liane McDonald, a putative class member, intervened to pursue the litigation. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

[1] Citations of Opinions and Orders of the Courts below are to pertinent pages in Petitioner's Appendix.

In late 1979, the District Court began to consider class-wide remedies, and only then "did the gargantuan proportions of this case become established." 43a. A class believed to number at most 140, *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 917 and n.2 (7th Cir. 1976), mushroomed to nearly 1800, with an "unprecedented" number (at least 1400) seeking reinstatement with full retroactive seniority to positions held on average for but 1⅓ years, AFA Ex. 17, and not since 1965-1968. 43a, 87a; 9a-12a.

After the Association of Flight Attendants ("AFA") intervened to represent the incumbent flight attendants, 4a, a three week evidentiary hearing was held to determine whether reinstatement of the class with full retroactive seniority could be equitably awarded without causing "unusual adverse impact." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 779 n.41 (1976) ("*Franks*"); 4a; 40a-41a. In the midst of trial, McDonald proposed that reinstatements be on a so-called "openings" basis, conditioned on: return of all claimants within two and one-half to three years before any furloughed incumbents, or "she would 'undoubtedly . . . petition the court to modify the decree,' " 23a; 56a; "front pay" (full pay and benefits until reinstated); and actions by United to create openings, requiring changes in the collective bargaining agreement. 23a-24a; 49a-56a. The Court found the proposed timetable unworkable and other conditions impermissible. 48a-60a; 23a-27a.

The District Court recognized that under *Franks* and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) ("*Teamsters*"), retroactive seniority is presumptively warranted, but may be denied if it would result in "unusual adverse impact." 44a-45a, 48a. The Court carefully considered the all-pervasive significance of seniority to the flight attendant position, 62a-64a; 5a-7a, and each area of adverse impact which would be caused by reinstatement with full seniority of a class whose enormous size and seniority relative to the incumbent work force

were unprecedented. 66a. On the basis of the evidence, the Court concluded that reinstatement of claimants with full retroactive seniority, whether at once or as openings arose, would cause unprecedented "unusual adverse impact" of "such grave proportions," 87a (including immediate and long-term loss of jobs and vital working conditions by thousands of incumbents), "that to ignore [it] would be a clear abuse of the Court's equitable discretion." *Id.*

The Court fashioned a remedy which "enable[s] the claimants to return to their jobs with the most favorable package of employment benefits which does not otherwise cause an unduly adverse impact" upon incumbents. 90a. It awarded class members full retroactive seniority for compensation and other significant benefits, 88a, 95a, placing each in the top pay bracket, 63a (at least $28,000 per year), with 30-37 days annual paid vacation, AFA Ex. 1, §18, and unlimited passes; other special relief, 88a n.32, 89a, 96a, 97a; and retroactive competitive seniority equal to seniority accrued by claimants prior to termination. 88a, 95a.

McDonald's motion to reconsider, seeking different relief (restoration of the "relative seniority" claimants held when terminated), was denied because its impact would be nearly as drastic as full retroactive seniority. 27a-30a and n.10.

B. The Court of Appeals affirmed in all respects. It held that the trial court had proceeded properly under *Franks* and *Teamsters,* in evaluating the many facets of impact upon incumbents of an award of full retroactive seniority, 12a-20a, and found ample support for the findings of "unusual adverse impact," regardless of whether reinstatements were immediate or by openings, 21a-27a, or with "relative" rather than full seniority. 27a-30a and n.10. The Court affirmed the award of full retroactive seniority for certain purposes and of partial retroactive seniority for others, as providing, consistent with *Franks,*

"the fullest possible relief for the class" that would not result in unusual adverse impact to incumbents. 32a, 36a-38a.[2] McDonald's Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied. 101a-102a.[3]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The decisions of the Courts below are fully consistent with the opinions of this Court and Title VII. They do not merit Supreme Court review.

This Court has not required district courts to ignore the facts presented and rotely adopt pre-ordained seniority remedies, as McDonald contends. Petition for Certiorari ("Pet."), pp. 7-10. *Franks* holds that an award of retroactive seniority, while presumptively warranted, is specifically not "requisite in all circumstances." 424 U.S. at 770.

> "[T]he statutory scheme of Title VII implicitly recognizes that there may be some cases calling for one remedy but not another. . . . Circumstances peculiar to the individual case may, of course, justify the modification or withholding of seniority relief for reasons that would not if applied generally undermine the purposes of Title VII." *Id.* at 779.

Retroactive seniority may be denied, in whole or in part, "on the basis of unusual adverse impact arising from facts

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[2] The Court also rejected a challenge by a single claimant, Joyce Barr, first raised after the District Court's decision, to evaluation of impact on the basis of 1,400 class members, and before completion of all individual entitlement trials. 9a-12a. McDonald now echoes Barr's challenge to the "1400" number, Pet., p. 6 n.3, but that "is the number upon which the AFA, United and McDonald agreed at pretrial conferences," 10a; 65a-66a n.16, and the record confirms its reasonableness. 11a-12a. Barr's renewed challenge following the appellate court's ruling, based on allegedly new facts, was rejected as "not well taken," Order, November 18, 1983; the experience in the entitlement hearings (approximately 75% favorable to claimants) has confirmed the validity of the "1400" number.

[3] We assume petitioner intended to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

and circumstances that would not be generally found in Title VII cases." *Id.* at 779 n.41. *Cf. Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 225-26 (1982) (back pay not mandatory under Title VII).

Teamsters confirms that retroactive seniority relief is not automatic. 431 U.S. at 365. In "devising and implementing remedies under Title VII," *id.* at 375, the district court has the "delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing," *id.* at 372, and must strike an "equitable balance" between the two. *Id.* at 376. The trial judge should " 'look to practical realities' " such as "the number of victims, the number of non-victim employees affected and the alternatives available to them, and the economic circumstances of the industry," in arriving at the " 'special blend of what is necessary, what is fair, and what is workable.' " *Id.* at 375 and 376 n.62 (*quoting Lemon* v. *Kurtzman*, 411 U.S. 192, 200, 201 (1973)). This requires the district court to focus on the particular circumstances presented. *Cf. Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 400-01 (1982) (with "impact" issue removed, Court declined to pass on whether award of retroactive seniority was appropriate "on the facts of this case").

McDonald's contention that the only "accommodation" available to incumbents is protection against "bumping," Pet., p. 9, rests on the same faulty assumption that full retroactive seniority must accompany reinstatement. As the Court below observed, this position "find[s] little support in *Franks*, the appellate decisions of . . . courts that have applied *Franks*, or the Supreme Court disposition in [*Teamsters*]." 14a.

II. The decisions below, applying *Franks* and *Teamsters*, are grounded on the unique facts of this case, which demonstrated extraordinary impact of unprecedented dimension. They do not merit Supreme Court review.

A. The District Court took as its starting point the *Franks* presumption of full seniority, and required United and AFA to demonstrate "unusual adverse impact." 31a; 48a. It carefully analyzed "the many different kinds of impact a grant of full, retroactive seniority would have" on incumbent flight attendants, 17a and 19a n.8, and concluded that full retroactive seniority would cause unusual adverse impact to incumbents "of a magnitude without precedent" in Title VII litigation. 87a.

The detailed record *in this case*—which McDonald ignores—amply supports the Courts' conclusions. Seniority, while generally important, is "singularly significant" to the United flight attendant position. 62a-64a; 5a-7a. Reinstatement with full retroactive seniority, whether immediate or by openings, of a class whose "size and seniority . . . relative to the incumbent work force is without precedent in any reported Title VII litigation," 66a,[4] would not merely diminish incumbents' expectations, Pet., p. 8, but inflict massive loss of presently held jobs and working conditions.

At least 1400 incumbents would be furloughed (laid off), suffering immediate, and likely permanent, job loss. 67a-68a and n.19; 21a. Other consequences would be "nearly as drastic." 69a. More than 500 incumbents would be involuntarily dislocated from their domiciles—the base for jobs and personal lives—forced either to uproot themselves and their families, or to endure the immense difficulties of commuting to distant domiciles. 69a-73a and n.20;

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[4] The class is as large as nearly 20% of the incumbent work force. 65a. If granted full retroactive seniority, the class' median seniority would exceed that of 88% of incumbents, and all would be in the top third of the seniority list. 66a.

21a-22a. Many would have no choice but to resign. 71a-72a and n.21; 22a. Thousands (nearly ⅓) would be displaced from lineholder to reserve status, 75a, a demotion tantamount to "a sentence to peonage massively affecting their lives and careers." 78a.[5] Work schedules would be significantly downgraded, 78a-81a; the enormous financial cost to United would "immediately impact" incumbents, 81a-83a; and the minority flight attendant population would be seriously reduced. 83a-84a; 22a-23a. These consequences would fall on innocent incumbents whose extensive efforts, not claimants', Pet., pp. 13-14, are responsible for the total transformation of the job from the "marginally attractive" position claimants left. 60a-62a, 86a.

In light of this drastic impact, full retroactive seniority could not be equitably awarded:

> "the adverse impact of reinstatement of 1400 claimants . . . is of a magnitude without precedent. The consequences . . . are of such grave proportions that to ignore them would be a clear abuse of the court's equitable discretion. To the extent that relief awarded under Title VII may result in an 'unusual adverse impact' in any circumstances, it does so here." 87a.

Delaying reinstatements until openings arose would "resolve the equitable dilemna only minimally," *id.*, because all claimants would return to the top of the seniority ranks, causing a massive decline in incumbents' seniority positions, with consequent loss of presently held jobs and working conditions. 66a, 77a-78a. "The impact would still be unduly adverse." 87a. After reviewing the record, the Court of Appeals fully affirmed. 21a-27a, 30a, 39a.

Having reached these findings and conclusions, the District Court considered "the full 'gamut' of possible senior-

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[5] The lineholder/reserve distinction is "the most fundamental that can be drawn among the flight attendant work force." 64a. A lineholder knows where and when she will fly before the month begins, whereas reserves' "lines of flying are determined by the airline, at its option, and according to its needs." 6a-7a; 73a-74a.

ity remedies," 27a-28a n.10, and applied its "keen[] appreciation of the peculiar facts and circumstances," *Franks*, 424 U.S. at 780, *quoting Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421-22 (1975), to forge a remedy which would provide claimants "the maximum measure that would not result in 'unusual adverse impact.'" 37a. It granted claimants full retroactive seniority for compensation and other key benefits, (*e.g.* vacations, passes), 88a, 95a; exempted all claimants from monthly reserve status, 88a n.32, 97a, forcing over one thousand incumbents to serve reserve who otherwise would not; and permitted claimants to await return to preferred domiciles. 89a, 96a. Subsequently, claimants were granted full retroactive seniority to select initial domicile assignments. Orders, September 16 and 23, 1983. To eliminate unusual adverse impact, the Court granted claimants retroactive seniority for competitive purposes equal to the time spent at United as flight attendants. 88a, 95a.

This remedy reflects "the sound equitable discretion of the trial court," *Teamsters*, 431 U.S. at 376, *see Franks*, 424 U.S. at 770, in striking "a careful balancing of rights and consequences" in this "extremely complicated case," 38a, "that has already been unresolved too long." 11a.

B. McDonald's misguided attack on the "approach" of the Courts below ignores the evidentiary foundation for their decisions, and provides no grounds for review by this Court.

First, the District Court did not abdicate its responsibilities or "consider[] its function performed when it rejected the [openings] proposals as tendered by the discriminatees," Pet., p. 12, in light of their impossible or impermissible conditions. 48a-60a; 23a-27a. Rather, it concluded, with ample evidentiary support, that incumbents would suffer nearly as extensive unusual adverse impact if claimants were returned to openings, even if workable, as if reinstated immediately. 68a-69a, 72a-73a, 76a-78a; 23a-27a.

Second, despite the alleged "overweening emphasis" on United's economic condition, Pet., p. 15—a factor properly considered under *Teamsters*, 431 U.S. at 376 n.62[6] —the Court awarded full retroactive seniority for all purposes which directly impact United, the only adjudged wrongdoer, costing $10 million initially and $21 million annually, 82a; 31a, *see* 36a-37a, in addition to a potential back pay liability whose magnitude has caused United's accountants to qualify its financial statements. Pl. Ex. 47.

Third, the Courts below neither ignored the impact to claimants, Pet., pp. 10, 14, nor displayed an "egregious disregard or noncomprehension of the purposes of civil rights legislation," Pet., p. 13, in declining to restore claimants' original seniority or the "relative seniority" obtained in months in the 1960s but which would take years to achieve in today's dramatically improved flight attendant position. 28a. The impact of "relative seniority" relief would be only minimally less devasting than an award of full retroactive seniority. 27a-30a and n.10.[7]

Fourth, the Courts did not rely upon the threats of an "unscrupulous employer" to use "inequitable artifices in order to limit the reach of Title VII relief," Pet., p. 16, but simply recognized that United could be expected to

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[6] None of the recent recalls of furloughed incumbents, to which McDonald refers, Pet., pp. 11-12 n.5, would have occurred under her openings proposal, which required return of all claimants before furloughees. 23a; 49a. In addition, the Court below foresaw and addressed a possible change in United's fortunes. 39a.

[7] Nothing in *Franks* or elsewhere suggests that incumbents have "diminished equities," Pet., p. 14, where, as here, they "were in no way responsible" for any discrimination, 28a, or for any alleged "obstructive and delaying tactics" by United. Pet., p. 14. Moreover, while McDonald suggests that the impact on incumbents is somehow unfairly augmented by flight attendant hiring since the suit commenced, Pet., pp. 5, 14, none have been hired since the "gargantuan" class size first became apparent. *See* "Statement of Case," p. 2, *supra*.

respond to the added $21 million annual expense of a front pay award[8] by "creating" openings to avoid paying two people for doing one person's job.

III. There is no conflict in the Circuits which requires Supreme Court resolution.

First, the appellate courts, like the Courts below, have consistently conducted evidentiary evaluations of the impact upon incumbents of proposed Title VII remedies. *E.g., Moore* v. *City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980); *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977); *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 173, 178 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

Second, as the Court below stated, "[t]he courts of appeals . . . have not read *Franks* as mandating so limited an inquiry as that urged by the class," and "have considered numerous factors, not just whether current employees would lose their jobs, in granting or reviewing a grant of seniority relief." 16a, 17a. For example, in *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, the Court "gave careful consideration to all the union's objections, and struck an appropriate balance," *id.* at 178, limiting priority rights for claimants to transfer and promotional opportunities, *id.* at 172, 174; for all other competitive purposes, claimants received precisely the same relief as here: "seniority . . . for time actually worked." 419 F.Supp. 1022, 1055 (E.D. Pa. 1976). Other Courts satisfied themselves that full retroactive seniority would cause only "minimal" impact, *Moore* v. *City of San Jose*, 615 F.2d at 1272 (12 claimants, 590 incumbents), or no "unusual harsh results." *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625, 644 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

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[8] Claimants, in seeking full pay and benefits until openings are available, 23a-24a; 49a, were hardly "willing to assume the risk" that United's economic condition would improve. Pet., pp. 15-16.

In the other cases cited by McDonald, the impact upon incumbents paled in comparison to that found here. Seniority relief was awarded to fifteen claimants in *Allen* v. *Amalgamated Transport Union, Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977), to two claimants in *Moseley* v. *Goodyear Tire & Rubber Co.*, 612 F.2d 187 (5th Cir. 1980), and *Inda* v. *United Air Lines, Inc.*, 565 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); and to but one in *Spagnuolo* v. *Whirlpool Corp.*, 717 F.2d 114 (4th Cir. 1983); *Sangster* v. *United Air Lines, Inc.*, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Gurmankin* v. *Costanzo*, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 923 (1981); and *Lee* v. *Macon County Bd. of Education*, 453 F.2d 1104 (5th Cir. 1971). In *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), there were 121 openings, 479 F.Supp. 101, 115 n.15 (D. Conn. 1979), but only 73 discriminatees, 647 F.2d at 286-87,[9] and all claimants, even if granted full seniority, would be in the bottom third of the seniority list. *Id.* at 285-86.[10] *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local U. No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983), deals principally with judicial authority to modify a consent decree, with different standards applicable, 679 F.2d at 564, no retroactive seniority was awarded, and only 2.4% of

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[9] A similar situation existed in *Franks*, where extensive turnover, 424 U.S. at 799 n.20 (Powell, J., concurring and dissenting), and the fact that few discriminatees accepted job offers weighed in favor of a full seniority award, *id.* at 766 n.36 and 799 n.20; any impact in *Franks* was indeed abstract, as the Court below emphasized. 15a.

[10] Of the 512 incumbents in *Bridgeport*, 402 had seniority greater than March, 1972, the maximum retroactive seniority any claimant could receive. 647 F.2d at 285, 286. If 73 claimants accepted employment, increasing the work force to 585, the most senior would only be in the 69th seniority percentile (403 of 585).

the 1028 white employees in the affected job classifications were impacted (3 laid off, 22 downgraded, out of seniority order). City of Memphis Brief, pp. 7 n.11, 8 n.13 and Addendum B.

A clear indication that the decisions below do not signal a conflict in the Circuits or presage any retreat from *Franks*, is that the Seventh Circuit has affirmed full seniority awards when presented with different factual records, as the Court below emphasized. 16a, 19a n.8. *Air Line Stewards and Stewardesses Association, Local 550* v. *Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980), *aff'd in part sub nom. Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (claimants, 3% of workforce, could be reinstated "as a result of normal attrition of workers in less than half a year," with no job loss to incumbents, 630 F.2d at 1166, 1169); *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978) (incumbents presented no evidence of impact, which "appeared to be minimal;" "number of returning employees [3% of workforce] was not so large as to create undue problems." 573 F.2d at 962, 964, 965).

Contrary to McDonald's claim, Pet., pp. 8-9, 15, the Court below found its ruling and approach in harmony with other Circuits, 14a, 16a-17a, 19a n.8, and based on a record which demonstrated unusual adverse impact of dimensions "not generally . . . found in Title VII cases," *Franks*, 424 U.S. at 779 n.41; indeed, "of a magnitude without precedent." 87a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BRIEF OF RESPONDENT BARR IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Does the decision of the Court of Appeals that reinstatement of a hypothetical number of class members with full retroactive seniority would have "unusual adverse impact" constitute an advisory opinion in conflict with the decision of this Court in Teamsters v. United States, 431 U.S. 324, 376 (1977)?

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STATEMENT

1. Following this Court's decision in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), the Seventh Circuit held that each prospective class member in this case must establish that "her retirement was involuntary and on account of the invalid rule to be entitled to relief." McDonald v. United Air Lines, Inc., 587 F.2d 357, 360 n.4 (7th Cir. 1978).

Prior to the start of these individual entitlement determinations, the district court held a hearing to assess the "unusual adverse impact," Franks v. Bowman, 424 U.S. 747, 779 n.41 (1976) of reinstatement with full seniority. This hearing, which was conducted on the assumption that 1400 of the 1700 claimants would be found entitled to relief and would seek to return to work (Pet.App. 65a n.16) resulted in a finding by the district court that

reinstatement of 1400 claimants would be of "magnitude without precedent" (Pet.App. 87a), and constituted "unusual adverse impact" sufficient to deny full retroactive seniority. (Pet.App. 92a.)

Thereafter, respondent Barr (who had theretofore been represented as an unnamed member of the plaintiff class) suggested to the district court that the "unusual adverse impact" question should not have been decided on the hypothesis that 1400 claimants would return to work.[1] Barr asserted that not more than 300 claimants would be found entitled to be class members and would seek to return to a position they had left 15 years before. The

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[1] Barr contended that the class representative, who had already been reinstated with full retroactive seniority, had agreed to litigate class reinstatment issues on an inflated number of the number of returnees in order to increase the size of the class backpay award. (Pet.App. 9a-10a.)

district court refused to reconsider its reinstatement decision, but permitted Barr to appear individually.

3. On appeal from the reinstatement decision, the court of appeals noted that the threshold issue was whether "the number 1,400 is a reasonable estimate of persons who will seek reinstatement." (Pet. App. 11a.) The court below held that the teaching of Teamsters v. United States, 431 U.S. 324 (1977) is "that the reinstatement issues now before this court would be better addressed by the district court only after the number of persons at least entitled to reinstatement is determined." (App. 10a, emphasis in original)

The court of appeals chose not to await a final determination of the number of persons entitled to reinstatement "because a case that has already been unresolved too long threatens to extend indefinitely

if resolution of the seniority questions are delayed until completion of the class eligibility hearings." (Pet.App. 10a-11a.) On the assumption that 1400 claimants would be found entitled to relief and would seek reinstatment, the court of appeals affirmed the finding of the district court that reinstatement with full retroactive seniority would have "unusual adverse impact."

During the pendency of petitions for rehearing, Barr formally advised the court of appeals of the results in the first 209 entitlement hearings[2] and projected that not more than 500 claimants would be found

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[2] In 57 (or 27%) of the first 209 entitlement hearings, a special master found that the claimant had not lost her employment because of the no-marriage rule. This success rate is inflated by the fact that the district court has permitted claimants to defer their entitlement hearings. Claimants opting to defer their entitlement hearings have done so because they are not interested in reinstatement or because, based upon decisions in similar cases, they believe that they will not prevail.

entitled to any remedy. In responding to Barr's "suggestion of mootness," the petitioner agreed that "the number of class members eligible for reinstatement will be considerably less than the 1,400 relied upon by the [district] court." (Petitioner's Response to "Suggestion of Mootness," page 6.)

The court of appeals denied the petitions for rehearing and concluded that "the suggestion of mootness . . . was not well taken." (Barr App. 2.)

REASONS FOR GRANTING THE WRIT

1. In Teamsters v. United States, 431 U.S. 324 (1977), the Court made plain that "unusual adverse impact" should not be assessed "until [entitlement] hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined." Id. at 376.

In this case, as in Teamsters, "a substantial number of individual determinations [will be required] in deciding which of the minority employees were actual victims of the company's discriminatory practices." 431 U.S. at 371-72. But "[u]ntil those hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined, it is not possible to evaluate abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the contractual rights of non-victim employees." Id. at 376.

The decision of the court of appeals in this case is flatly at odds with Teamsters. The departure of the court below from Teamsters has resulted in "an opinion advising what the law would be upon a hypothetical state of facts" contrary to

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937). While the court of appeals sought to justify its advisory opinion "because a case that has already been unresolved too long threatens to extend indefinitely" (Pet.App. 10a-11a), this was error: "However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions." FCC v. Pacifica Foundation, 438 U.S. 726, 735-36 (1978).

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted and the decision of the court of appeals vacated.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CAROLE ANDERSON ROMASANTA, et al., Plaintiffs, and LIANE BUIX McDONALD, etc., Plaintiff-Appellant, Cross-Appellee,	)	
-vs-	)	82-2660 82-2661
UNITED AIR LINES, INC. et al., Defendant-Appellee, Cross-Appellant.	)	

November 18, 1983

Before Pell and Cudahy, Circuit Judges, and Gibson, Senior Circuit Judge (of the Eighth Circuit, sitting by designation)

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Joyce Barr, intervenor, no judge in active service having requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

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** Judge Posner did not participate in the consideration of the decision of the petition for rehearing en banc.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

While the above petition for rehearing was pending, the intervenor, Joyce Barr, filed her suggestion of mootness requesting the court to vacate its decision and remand the case to the district court with instructions to consider the question of mootness. The court, being of the opinion on consideration of the suggestion of mootness and the responses thereto that the suggestion was not well taken, the requested relief is DENIED.

Office - Supreme Court, U.S
FILED
MAR 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1180

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS

and

JOYCE BARR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO BRIEFS OF RESPONDENTS IN OPPOSITION AND SUPPORT OF PETITION

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The heavy reliance of Respondents on contentions which were rejected below—indeed which were rejected by this Court in its previous consideration of this case, *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977)—and their failure to defend squarely major grounds of the decision below, only emphasize the departure of that decision from the governing law.

1. *Opposition of United Air Lines*

United primarily contends that the granting of retroactive competitive seniority to the class is either barred by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), or is inequitable, because most members of the class did not file individual timely charges with the Equal Employment Opportunity Commission. The Court below rejected United's contention (Pet. App. 32a-35a), and that contention is unsound. *Evans* was not a class action, and as this Court subsequently noted in this very case (432 U.S. at 389 n.6):

> "6. As the opinion in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, makes clear, full relief under Title VII 'may be awarded on a class basis . . . without exhaustion of administrative procedures by the unnamed class members.' *Id.*, at 414 n.8. See also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771."

As stated in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975), the Courts of Appeals had unanimously rejected the view that each class member must file a separate EEOC complaint, and "[t]he Congress plainly ratified this construction of the Act in the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103."

To suggest that class members, although they can sue, should be deprived of relief otherwise available if they did not individually file complaints with the EEOC, clashes with this unbroken precedent, including the specific ruling by this Court in this case that "full relief" is available to such persons. If a failure to file separately had the consequences urged by United, individual class members would have to flood the EEOC with duplicative complaints, defeating the intention of Congress, contravening the purposes of class handling of disputes, and seriously burdening the machinery of the EEOC. Further, to penalize class members without prior warning for following

a course approved by the Courts and Congress, of reliance upon complaints of others, would be anything but equitable.

Other contentions of United requires only brief comment. Insofar as United asserts that the class action "has hung by the thinnest of threads" or is "a hollow shell" in which class members seek a "windfall," that hyperbole is baseless. In part it merely repeats United's view that anyone whose claim relies on the fact that others have filed EEOC complaints is not a real plaintiff and lacks equities. In part it is merely caviling over prior judicial decisions adverse to, but binding upon, United, regarding class action issues. But in part it also meretriciously disparages hundreds of women by implying that anyone who has failed to become discouraged by United's success in delaying relief for more than twelve years since the underlying practice was held invalid must be trying to gain something to which she is not entitled.[1] Such attacks are diversionary; they are not responsive to the issues on their merits and they only emphasize the inequity of subordinating the rights of the class to those of persons hired during that period.

United also characterizes the openings approach as a "sham" (Br. in Opp. 9). If so, review is all the more warranted, as many other Courts have accepted it. Finally, United while not responding in detail to the contention (Pet. 11-17) that the Courts below denied Petitioner's class relief for invalid reasons, debilitating to effective enforcement of Title VII, stresses its threat to harm incumbents if the class is given adequate relief, explaining that this would serve its economic interests (Br.

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[1] In the District Court, United has not admitted that a single one of the flight attendants who have sworn that their departure from United's employment was due to the no-marriage rule was telling the truth. It has put every one of these women to their proof, requiring hundreds of hearings and further delaying the award of relief.

in Opp. 9-10). That position, adopted below, also should be scrutinized by this Court on the merits.

2. ***Opposition of Association of Flight Attendants.***

Most of AFA's arguments already have been anticipated, and we will not repeat the points made in the Petition, to which the Court is respectfully referred. AFA's position depends on an unsound equation of the effects of immediate reinstatement of the entire class with reinstatement on an openings basis. It characterizes alleged effects of granting the class retroactive seniority as the same "whether immediate or by openings . . ." (Br. in Opp. 6). But nothing supports such an equation; it has obviously been rejected by other Courts.

The evidence presented at trial by AFA or United was directed to effects of immediate reinstatement of the entire class. No one testified, for example, that there would be *any* discharges of incumbents, or that there would be displacement of any incumbents from their present domiciles if Petitioner's class were reinstated as openings occurred. The seniority provisions of the collective bargaining agreement (AFA Exhs. 1 and 2) do not provide for such an occurrence. While the District Court noted that under the openings proposal "the impact of reinstatement in terms of involuntary transfers would be vitiated," it dubbed the proposal unrealistic (Pet. App. 72a). The equation of the openings approach with immediate reinstatement irrespective of whether openings exist is not grounded in evidence or "the unique facts of this case" (AFA Opp. 6); rather it is a novel legal theory, explained only by the argument that the two should be treated as the same because Petitioner reserved the right to return to court if the openings approach resulted in too slow a reinstatement pace (Pet. App. 25a-26a). That mode of analysis, which Respondents fail to support, is inconsistent with the approach of other Courts of Appeals, and with the Court's duty under *Franks* v. *Bowman Trans-*

portation Co., 424 U.S. 747 (1976), and it is illogical and inequitable.[2]

The AFA does not deny the novelty of the ruling below, but asserts that more employees are involved here than in other cases following the openings approach. In fact, the class of discrimination victims is no greater a portion of the affected employees here than it was in other cases adopting the openings approach;[3] and that approach by its nature ameliorates any undue effect of a significant number of victims of discrimination being suddenly reintroduced into the work force. AFA cites only one case, *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167, 178 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978), as a supposed example of an appellate court not requiring full competitive seniority to discriminatees. However, that case—the general tenor of which is quite unfavorable to Respondents' position—involved a consent order between an employer who had been alleged but never found to have discriminated, and a class of persons who were not identified victims of discrimination.[4] That the Court approved

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[2] Although the issue is, like that decided in *Franks*, one of the proper standards to apply, if somehow it were deemed "factual" then the rulings below would be clearly erroneous, as no evidence was offered to support the improbable proposition that a return as openings occur approach would have the same effect as immediate reinstatement.

[3] *E.g.*, *Franks*, *supra*, 424 U.S. at 776 n.36, 495 F.2d 398, 410 n.10 (class was 166 out of 510, or 33 percent); *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 331-332, 337 (1977) (334 class members in work force of 1,828, or 18 percent); *Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 286 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (102 out of 512, or 20 percent). Here the class, assuming the high estimate of 1,400 used by the Court below, would not exceed about 16 percent of the work force.

[4] In contrast, the only persons entitled to reinstatement here are those found to have been injured by United's no-marriage rule at individual adversarial hearings. But even persons who are not

the agreement of the parties, which included a compromise granting only partial competitive seniority, is no precedent for the ruling below uncompromisingly denying such seniority to a class of those who are the identified victims of a practice adjudicated to be illegal.[5] The ruling below is unprecedented in that regard, and seriously alters the landscape of issues of relief in Title VII cases.

3. *Barr's Response.*

Joyce Barr, who is a member of the class, seeks to raise the issue of whether the Courts below improperly decided the competitive seniority issues before the individual hearings were completed. Petitioner McDonald, as representative of the class, urged the District Court to hear at least test cases before passing on those issues. United and the AFA, however, persuaded the District Court to decide them before any individual hearings took place. Once the District Court denied retroactive competitive seniority, Petitioner concluded that in view of the delay in obtaining relief which the class already had suffered, the correctness of the District Court's decision should be tested promptly on appeal. At this stage of the litigation 15 to 18 years have elapsed since the discriminatory acts and more than 12 years since liability was established.

The many persons who have been, or will be, returning to work necessarily must know their seniority status be-

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identified victims of discrimination have been protected from the loss of competitive seniority. *Cf. Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983).

[5] The *AT&T* litigation is instructive in that even though tens of thousands of employees were involved, and even though it was reviewing a consent judgment, the Court did not evince a passivity toward the rights of claimed victims of discrimination like that which occurred here.

fore they can return. In these circumstances, Barr's position would cause even further delays in reinstatement and is not practicable. Petitioner submits that she has identified error in the ruling below ample to warrant reversal. Barr's further position that if any premise of the ruling below is incorrect, this Court is being asked to issue an "advisory opinion," is unsound. Unfortunately, the effect upon the class of denial of the seniority sought is all too concrete and real.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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